

# COMPETENCE TO STAND TRIAL

[REVISED 2010]



ADMINISTRATIVE OFFICE  
OF THE COURTS

---

EDUCATION DIVISION/CENTER FOR  
JUDICIAL EDUCATION AND RESEARCH

## ABOUT CJER

The California Center for Judicial Education and Research (CJER), as the Education Division of the Administrative Office of the Courts (AOC), is responsible for developing and maintaining a comprehensive and quality educational program for the California judicial branch. Formed in 1973 as a joint enterprise of the Judicial Council and the California Judges Association, CJER supports the Chief Justice, the Judicial Council, and the courts by providing an extensive statewide educational program for judicial officers and court staff at both the trial and appellate levels. It includes orientation programs for new judicial officers, court clerks, and administrative officers; continuing education programs for judicial officers, court administrators, and managers; an annual statewide conference for judicial officers and court administrators; video and audiotapes; and judicial benchbooks, benchguides, and practice aids.

---

### CJER GOVERNING COMMITTEE

Hon. Ronald B. Robie, Chair  
Court of Appeal, Sacramento  
Hon. Robert L. Dondero, Vice-Chair  
Superior Court of California, County of San Francisco  
Hon. Gail A. Andler  
Superior Court of California, County of Orange  
Mr. Stephen Anthony Bouch  
Executive Officer  
Superior Court of California, County of Napa  
Ms. Tressa S. Kentner  
Executive Officer  
Superior Court of California, County of San Bernardino  
Hon. Barbara A. Kronlund  
Superior Court of California, County of San Joaquin  
Hon. William A. MacLaughlin  
Superior Court of California, County of Los Angeles  
Mr. Michael A. Tozzi  
Executive Officer  
Superior Court of California, County of Stanislaus

Hon. Theodore M. Weathers  
Superior Court of California, County of San Diego  
Hon. Elizabeth Allen White  
Superior Court of California, County of Los Angeles  
Hon. Arthur A. Wick  
Superior Court of California, County of Sonoma

### Advisory Members

Hon. Socrates Peter Manoukian  
Superior Court of California, County of Santa Clara  
*California Judges Association*  
Mr. William C. Vickrey  
Administrative Director  
*Administrative Office of the Courts*

### CJER PROJECT STAFF

Barry Harding  
Senior Attorney, Publications  
Iris Okura  
Senior Editor

---

### JUDICIAL PLANNING COMMITTEE FOR CALIFORNIA JUDGES BENCHGUIDES

Hon. Carol Yaggy, Chair  
Superior Court of California, County of San Francisco  
Hon. Kathleen M. Banke  
Court of Appeal, San Francisco  
Hon. Joyce M. Cram  
Superior Court of California, County of Contra Costa  
Hon. Ross Klein  
Superior Court of California, County of Los Angeles

Hon. Nancy Case Shaffer  
Superior Court of California, County of Sonoma  
Hon. Elaine Streger  
Superior Court of California, County of Orange  
Hon. Elizabeth Allen White  
Superior Court of California, County of Los Angeles  
*CJER Governing Committee Liaison*

### BENCHGUIDE CONSULTANTS

Hon. Gary L. Bindman (Ret.)  
Superior Court of California, County of Los Angeles  
Hon. Edward Forstenzer  
Superior Court of California, County of Mono

Editorial comments and inquiries: Barry Harding, Senior Attorney 415-865-7745,  
fax 415-865-4335

© 2010 by Judicial Council of California/Administrative Office of the Courts  
Published February 2010; covers case law through 47 C4th 850, 179 CA4th, and all legislation to 1/1/2010

## COMPETENCE TO STAND TRIAL

### I. [§63.1] SCOPE OF BENCHGUIDE

### II. PROCEDURE

- A. [§63.2] Checklist: Questioning Defendant's Mental Competence Under Pen C §1368 (Felony Case)
- B. [§63.3] Checklist: Questioning Defendant's Mental Competence Under Pen C §1367.1 (Misdemeanor Case)
- C. [§63.4] Checklist: Referral of Mentally Disordered Defendant for Mental Health Evaluation Under Pen C §4011.6

### III. APPLICABLE LAW

- A. [§63.5] Constitutional and Statutory Requirements
- B. Incompetency Proceedings in Felony Cases
  - 1. Defense Request for Competency Hearing
    - a. [§63.6] Evaluation of Request
    - b. [§63.7] Retroactive Determination Not Required
  - 2. Procedure When Court Doubts Defendant's Competence
    - a. [§63.8] Inquiry Into Defendant's Competence
    - b. [§63.9] Stating Court's Doubt on Record
    - c. [§63.10] Requesting Counsel's Opinion
    - d. [§63.11] Appointing Counsel and Declaring Recess
    - e. [§63.12] Appointing Mental Health Expert
    - f. [§63.13] Court's Action on Counsel's Opinion
    - g. [§63.14] Judge's Continuing Duty
  - 3. Determining What Constitutes Substantial Evidence
    - a. [§63.15] General Guidelines
    - b. [§63.16] What Constitutes Substantial Evidence
    - c. [§63.17] What Does Not Constitute Substantial Evidence
  - 4. [§63.18] Suspension of Proceedings
  - 5. Hearing Specified Matters During Suspension

- a. [§63.19] Demurrer, Suppression Motion, and Motion To Dismiss
- b. [§63.20] Conditional Examination of Witness
- c. [§63.21] Substitution of Counsel; Self-Representation
- 6. [§63.22] Appointment of Experts/Evaluation of Defendant
  - a. [§63.23] Appropriateness of Antipsychotic Medication
  - b. [§63.24] Use of Defendant's Statements in Subsequent Proceedings
  - c. [§63.25] Presence of Defense Counsel During Examination
  - d. [§63.26] Consequences of Refusal To Submit to Examination
  - e. [§63.27] Stipulated Hearing on Doctors' Reports
- C. Competency Hearing
  - 1. [§63.28] Hearing Judge
  - 2. [§63.29] Right to Jury Trial
  - 3. [§63.30] Presumption of Competence; Burden of Proof
  - 4. [§63.31] Presentation of Evidence
  - 5. [§63.32] Verdict and Findings
  - 6. [§63.33] Situations Requiring Second Hearing
  - 7. [§63.34] Consequences of Erroneous Denial of Hearing
- D. Commitment to Treatment Facility or Outpatient Status Placement
  - 1. [§63.35] Evaluation by Community Program Director
  - 2. Administration of Antipsychotic Medication
    - a. [§63.36] Voluntary Treatment
    - b. [§63.37] Involuntary Treatment
  - 3. [§63.38] Commitment Order
  - 4. [§63.39] Documentation To Accompany Defendant
  - 5. [§63.40] Transfer of Defendant to Another Facility
  - 6. [§63.41] Outpatient Status Placement
  - 7. [§63.42] Progress Reports
  - 8. [§63.43] Duration of Commitment; Credit for Precommitment Confinement
  - 9. [§63.44] Defendant's Return to Court Before Recovery
  - 10. [§63.45] Initiation and Effect of Conservatorship Proceedings
  - 11. [§63.46] Dismissal of Criminal Action
- E. [§63.47] Commitment of Defendant Charged With Designated Felony Sex Offense
- F. [§63.48] Commitment of Defendant Charged With Violent Felony

- G. [§63.49] Outpatient Status Procedures
  - 1. [§63.50] Restrictions on Release for Some Defendants
  - 2. [§63.51] Treatment Recommendation; Hearing and Determination by Court
  - 3. [§63.52] Progress Reports; Annual Review
  - 4. [§63.53] Restoration of Mental Competence
  - 5. [§63.54] Revocation of Outpatient Status
- H. [§63.55] Incompetency Procedures in Misdemeanor Cases
  - 1. [§63.56] Judge's Preliminary Conclusion of Incompetence
  - 2. [§63.57] Counsel's Opinion of Incompetence
  - 3. [§63.58] Referral for Evaluation and Treatment
  - 4. [§63.59] Defendant's Return to Court
  - 5. Commitment to Treatment Facility or Outpatient Status Placement
    - a. [§63.60] Evaluation by Mental Health Director
    - b. Administration of Antipsychotic Medication
      - (1) [§63.61] Voluntary Treatment
      - (2) [§63.62] Involuntary Treatment
    - c. [§63.63] Commitment Order
    - d. [§63.64] Documentation To Accompany Defendant
    - e. [§63.65] Transfer of Defendant to Another Facility
  - 6. [§63.66] Outpatient Status Placement
  - 7. [§63.67] Progress Reports
  - 8. [§63.68] Duration of Commitment; Credit for Precommitment Confinement
  - 9. [§63.69] Defendant's Return to Court Before Recovery
  - 10. [§63.70] Initiation and Effect of Conservatorship Proceedings
  - 11. [§63.71] Dismissal of Criminal Action
- I. [§63.72] Commitment of Developmentally Disabled Defendants
- J. [§63.73] Restoration of Mental Competence
  - 1. [§63.74] Restoration Hearing
  - 2. [§63.75] Bail or Own-Recognizance Release
  - 3. [§63.76] Commitment Time Credit
  - 4. [§63.77] Calculating Statutory Time Limitations When Criminal Proceedings Reinstated
- K. Referral for Mental Health Evaluation Under Pen C §4011.6
  - 1. [§63.78] Procedure for Court Referral of Defendant
  - 2. [§63.79] Mental Health Report
  - 3. [§63.80] Applicable Welfare and Institutions Code Provisions

4. [§63.81] Conversion to Voluntary Inpatient Status
5. [§63.82] Effect of Referral on Statutory Time Limitations
6. [§63.83] Effect of Detention on Sentence
7. [§63.84] Initiation of Conservatorship Proceedings
- L. [§63.85] Mental Retardation Hearing in Death Penalty Cases

#### IV. SAMPLE FORMS

- A. [§63.86] Script: Judge Expresses Doubt About Defendant's Present Mental Competence Under Pen C §1368; Defense Counsel Agrees
- B. [§63.87] Script: Judge Expresses Doubt About Defendant's Present Mental Competence Under Pen C §1368; Defense Counsel Disagrees
- C. [§63.88] Script: Judge Expresses Doubt About Defendant's Present Mental Competence Under Pen C §1367.1 (Misdemeanor Case)
- D. [§63.89] Script: Findings Regarding Administration of Antipsychotic Medication
- E. [§63.90] Written Form: Letter Appointing Mental Health Expert Under Evid C §730
- F. [§63.91] Written Form: Referral of Defendant for Mental Health Evaluation Under Pen C §4011.6
- G. [§63.92] Written Form: Order for Examination and Determination of Mental Competence
- H. [§63.93] Written Form: Order To Initiate Conservatorship Proceedings

#### V. [§63.94] ADDITIONAL REFERENCES

##### TABLE OF STATUTES

##### TABLE OF CASES

#### I. [§63.1] SCOPE OF BENCHGUIDE

This benchguide provides an overview of procedures for evaluating a defendant's mental ability to participate and make certain decisions in criminal proceedings. It focuses on both misdemeanor and felony commitment procedures when a doubt arises about defendant's competence to stand trial. This benchguide also describes the procedure under [Pen C §4011.6](#) for referral of a defendant who appears to have a mental disorder for treatment and evaluation under the [Lanterman-Petris-Short \(LPS\) Act](#) ([Welf & I C §§5000–5550](#)). For an in-depth discussion of the civil commitment provisions of the LPS Act, see California Judges Benchguide 120: *LPS Proceedings* (Cal CJER).

## II. PROCEDURE

### A. [§63.2] Checklist: Questioning Defendant’s Mental Competence Under Pen C §1368 (Felony Case)

(1) *Has defense counsel questioned defendant’s mental competence to be tried or punished and requested a competency hearing?* Pen C §1368. A competency hearing is mandated only if there is objective substantial evidence of defendant’s incompetence, regardless of counsel’s subjective opinion. For discussion, see §§63.6–63.7.

(2) *Has a doubt arisen in the mind of the judge about defendant’s mental competence to be tried or punished?* Pen C §1368(a). Ask defendant questions to assess his or her competence. For discussion, see §63.8. For a definition of mental incompetence, see §63.5. For an alternative procedure under Pen C §4011.6, see §63.4.

(3) *State in the record the judge’s doubt about defendant’s mental competence.* Pen C §1368(a). For discussion, see §63.9.

(4) *Ask defense counsel whether, in his or her opinion, defendant is mentally competent.* Pen C §1368(a). Counsel’s expression of an opinion does not violate the attorney-client privilege. Counsel is not required to answer. For discussion, see §63.10.

(5) *Appoint an attorney if defendant is unrepresented.* Pen C §1368(a).

(6) *Declare a recess if requested by defendant or defense counsel, or on the court’s own motion.* Recess for a reasonably necessary time to permit counsel to confer with defendant and to form an opinion about defendant’s mental competence. Pen C §1368(a). For discussion, see §63.11.

(7) *Consider appointing a mental health expert under Evid C §730 to help determine whether to order a competency hearing.* For discussion of legal and practical considerations, see §63.12. Set a reasonably short deadline for receipt of the expert’s report.

(8) *If there is substantial evidence of defendant’s incompetence, order a competency hearing and suspend the criminal proceedings.* Pen C §§1368(b)–(c), 1369. Substantial evidence consists of a mental health expert’s report indicating defendant is incompetent, or possibly a combination of other factors. For discussion, see §§63.13, 63.15–63.18.

➡ **JUDICIAL TIP:** The statute states that the court “shall” order a competency hearing if defense counsel believes defendant is incompetent. The court is *required* to order a hearing, however, only when there is objective, substantial evidence of defendant’s mental incompetence. *People v Howard* (1992) 1 C4th 1132, 1164, 5 CR2d 268. For discussion, see §63.13.

(9) *If the evidence of incompetence is less than substantial, either order competency hearing or continue with the criminal proceedings.* The court has discretion on whether to order a hearing if evidence of incompetence is less than substantial. [Pen C §1368\(b\)](#); *People v Hale* (1988) 44 C3d 531, 540, 244 CR 114. For discussion, see §63.13.

➡ JUDICIAL TIP: The court is unlikely to be challenged or reversed on appeal if it orders the competency hearing in a close case and the hearing is actually held. An erroneous *denial* of a competency hearing, however, compels reversal of the judgment. See discussion in §63.34.

(10) *Advise the defendant of his or her rights at the hearing.* The court is not required to advise a defendant represented by counsel of the right to a jury trial. A jury trial must be requested by the defendant or defense counsel. For discussion, see §63.29.

(11) *Appoint psychiatrist(s) or licensed psychologist(s) to examine the defendant and report to the court their opinions about the defendant's competence and whether treating the defendant with antipsychotics is medically appropriate.* [Pen C §1369\(a\)](#). The court must appoint two psychiatrists or psychologists to examine the defendant if the defendant or defense counsel is not seeking a finding of mental incompetence. [Pen C §1369\(a\)](#). For discussion, see §§63.22–63.23.

(12) *Set a due date for the psychiatric report(s) and a date for the defendant to return to court to review the report(s).* At this review hearing, defense counsel and the prosecutor may stipulate to the findings of the psychiatrist(s). For discussion, see §63.27.

(13) *Discharge an impaneled and sworn jury only if it appears that undue hardship to the jurors would result if retained on call.* [Pen C §1368\(c\)](#). The jury must be discharged if defendant is declared mentally incompetent. [Pen C §1368\(c\)](#).

(14) *If, on the defendant's return, the parties stipulate to the psychiatric report(s), make a finding of competency or incompetency based on the report(s).*

- *If the court finds the defendant competent, order the criminal proceedings reinstated.*
- *If the court finds the defendant incompetent, order the community program director (or designee) to evaluate the defendant and submit a written recommendation of commitment within 15 days.* For discussion, see §63.35.
- *If the court finds the defendant incompetent, hear and determine whether the defendant, with advice of counsel, consents to the administration of antipsychotic medication.*



- If the defendant consents, include confirmation in the commitment order that antipsychotic medication may be given to the defendant as prescribed by a treating psychiatrist. For discussion, see §63.36.
- If the defendant does not consent, order the involuntary medication of the defendant only if the court makes the necessary factual findings outlined in Pen C §1370(a)(2)(B)(ii). For discussion, see §63.37.

See sample scripts of findings regarding the administration of antipsychotic medication in §63.89.

(15) *If, on the defendant's return, the parties do not stipulate to the psychiatric report(s), set competency hearing date.*

**B. [§63.3] Checklist: Questioning Defendant's Mental Competence Under Pen C §1367.1 (Misdemeanor Case)**

BULLETIN: The Second District Court of Appeal has declared that Pen C §1367.1 is unconstitutional, holding that the statute deprives misdemeanor defendants of equal protection. The court found no compelling state interest in requiring a misdemeanor defendant, believed to be incompetent because of a mental disorder, to submit to involuntary evaluation and treatment under the *Lanterman-Petris-Short Act* instead of or prior to a competency determination. *Pederson v Superior Court* (2003) 105 CA4th 931, 939–942, 130 CR2d 289. The court directs all trial courts to handle misdemeanor cases according to Pen C §1368, in the same manner as felony cases (see checklist in §§63.2, 63.6–63.27). 105 CA4th at 943. CJER has chosen to retain the checklist below and §§63.55–63.71, addressing procedures under Pen C §1367.1, pending further case law developments and/or legislative revision of the codes.

(1) *Does the judge have reason to believe that defendant is mentally disordered and as a result may be incompetent to stand trial?* Pen C §1367.1(a). Ask defendant questions to assess his or her competence.

(2) *State in the record the judge's reasons for believing defendant may be incompetent.* Pen C §1367.1(a). For discussion, see §63.56.

(3) *Ask defense counsel whether, in his or her opinion, defendant is mentally disordered.* Pen C §1367.1(a). For discussion, see §63.57.

(4) *Appoint an attorney if defendant is unrepresented.* Pen C §1367.1(a).

(5) *Declare a recess if requested by defendant or defense counsel, or on the court's own motion.* Recess for as long as may be reasonably necessary to allow counsel to confer with defendant and to form an opinion about whether the defendant is mentally disordered. Pen C §1367.1(a). For discussion, see §63.57.

(6) *If there is substantial evidence that defendant is mentally disordered, order defendant to be taken to a designated health care facility for a 72-hour evaluation and treatment under Welf & I C §5150 and suspend the criminal proceedings for the duration of the evaluation. Pen C §§1367.1(b)–(c), 4011.6. For discussion, see §63.58.*

(7) *Order defendant to be returned to court at conclusion of the evaluation and treatment. Pen C §1367.1(d). For discussion, see §63.59.*

(8) *Inform the facility in writing of the reason(s) that defendant is being taken there. The writing must be confidential. Pen C §4011.6 (first paragraph). For discussion, see §63.78.*

(9) [Optional:] *Order the facility to provide the court with a copy of the discharge summary at the conclusion of the evaluation and treatment. Pen C §1367.1(b).*

(10) *Immediately notify and serve a copy of the commitment order on the defense attorney, prosecuting attorney, and local mental health director or his or her designee. Pen C §4011.6 (second paragraph). For discussion, see §63.78.*

(11) *If, on defendant's return to court, the court concludes that the defendant is competent, continue with the criminal proceedings. Pen C §1367.1(d). For discussion of calculating time when proceedings are reinstated, see §63.77.*

(12) *If, on defendant's return, the judge has reason to believe that defendant may be incompetent despite the treatment, order competency hearing and suspend the proceedings. Pen C §§1367.1(d), 1368(c), 1369. For discussion, see §63.59.*

(13) *Discharge an impaneled and sworn jury only if it appears that undue hardship to the jurors would result if retained on call. Pen C §1367.1(c). The jury must be discharged if defendant is declared mentally incompetent. Pen C §1368(c).*

### **C. [§63.4] Checklist: Referral of Mentally Disordered Defendant for Mental Health Evaluation Under Pen C §4011.6**

(1) *Does it appear to the judge that defendant in custody may be mentally disordered? Pen C §4011.6.*

- Has defense counsel or the district attorney questioned defendant's mental state?
- Does defendant's courtroom conduct suggest that he or she is mentally disordered?
- Does defendant appear to be a danger to others, a danger to himself or herself, or gravely disabled? See Welf & I C §§5008(h), 5150.

(2) *If the answer to item (1) is yes, the court may order defendant to be taken to a designated health care facility for 72-hour evaluation and*

treatment under *Welf & I C §5150*. *Pen C §4011.6* (first paragraph). For discussion, see §63.78. For sample referral form, see §63.91.

(3) *Order defendant to be returned to court at conclusion of the evaluation and treatment.* *Welf & I C §5151*.

(4) *Before referring defendant, seek a time waiver from defense counsel or defendant.* Exercise caution, however, because defendant may not be capable of waiving time. For discussion of time limitations, see §63.82.

(5) *Inform the facility in writing of the reason(s) that defendant is being taken there.* The writing must be confidential. *Pen C §4011.6* (first paragraph).

(6) *Immediately notify and serve a copy of the commitment order on the defense attorney, prosecuting attorney, and local mental health director or his or her designee.* *Pen C §4011.6* (second paragraph). For discussion, see §63.78.

➡ **JUDICIAL TIP:** Referral of an in-custody defendant under *Pen C §4011.6* essentially invokes specified civil commitment procedures of the *LPS Act* (*Welf & I C §§5000–5550*). The duration of the commitment on a *Pen C §4011.6* referral will be governed by the *LPS Act*, depending on defendant’s mental condition. In many cases, the referral and treatment will restore defendant’s competence and preclude the necessity for *Pen C §1368* proceedings. For discussion, see §63.80.

(7) *Continue with the criminal proceedings on the date set for return of defendant.* The commitment on a *Pen C §4011.6* referral does not preclude the criminal proceedings from continuing during treatment, unless the person in charge of the treatment facility determines that arraignment or trial would be detrimental to his or her well-being. *Pen C §4011.6* (seventh paragraph). For discussion, see §63.82.

(8) *Credit time defendant is detained in mental health facility against defendant’s sentence.* *Pen C §4011.6* (fifth paragraph). For discussion, see §63.83.

### III. APPLICABLE LAW

#### A. [§63.5] Constitutional and Statutory Requirements

A person cannot be tried or sentenced while mentally incompetent. *Pen C §1367(a)*; *Godinez v Moran* (1993) 509 US 389, 396, 113 S Ct 2680, 125 L Ed 2d 321; *Pate v Robinson* (1966) 383 US 375, 378, 86 S Ct 836, 15 L Ed 2d 815; *People v Hayes* (1999) 21 C4th 1211, 1281, 91 CR2d 211. The failure of a trial court to employ procedures to protect against the trial of an incompetent defendant deprives the defendant of the due process right to a fair trial and requires reversal of his or her

conviction. *Pate v Robinson, supra*; *People v Hayes, supra*; *People v Hale* (1988) 44 C3d 531, 539, 244 CR 114.

The standards for determining whether a defendant is presently competent to stand trial or be sentenced under Pen C §1367(a) are as follows:

- The defendant must be capable of understanding the nature and purpose of the criminal proceedings;
- The defendant must comprehend his or her own status and condition in reference to these proceedings; and
- The defendant must be able to assist his or her attorney in conducting a defense, or be able to conduct his or her own defense in a rational manner. Pen C §1367(a); *People v Conrad* (1982) 132 CA3d 361, 369, 182 CR 912.

Incompetency proceedings fall under three different statutory schemes. When the defendant is charged with a felony, the procedure for determining the defendant's competence is governed by Pen C §1370. If the defendant is charged with misdemeanors only, Pen C §§1367.1 and 1370.01 govern (but see Bulletin in §63.3). If a defendant is developmentally disabled, Pen C §1370.1 outlines the procedure for determining competence. See Pen C §1367(b). Each of these statutory schemes is addressed in this benchguide.

## **B. Incompetency Proceedings in Felony Cases**

### **1. Defense Request for Competency Hearing**

#### **a. [§63.6] Evaluation of Request**

Defense counsel frequently raises the issue of the defendant's competence during a proceeding by stating that the defendant is uncooperative or unable to assist in the defense and moving for a competency hearing under Pen C §1368. A defendant is entitled to a Pen C §1368 hearing as a matter of right, however, only if he or she comes forward with substantial evidence of present mental incompetence. *People v Welch* (1999) 20 C4th 701, 737–738, 85 CR2d 203. The opinion of counsel must include a statement of specific reasons supporting that opinion to constitute substantial evidence of incompetence. Cal Rules of Ct 4.130(b)(2). When the evidence casting doubt on the defendant's present competence is less than substantial, the trial judge has discretion in deciding whether to order a competency hearing. 20 C4th at 742. For discussion of what constitutes substantial evidence, see §§63.15–63.16.

Penal Code §1368(b), which states that the court “shall” order a competency hearing “if counsel informs the court that he or she believes defendant is or may be mentally incompetent,” appears at first glance to

mandate a hearing whenever counsel voices a belief that defendant is incompetent. Reading this provision in response to [Pen C §1368\(a\)](#), however, the courts have required substantial evidence of doubt about the defendant's mental competence before the defendant is entitled to a hearing. *People v Welch*, *supra*, 20 C4th at 739 n7 (judge is not required to order competence hearing based merely on counsel's perception that defendant may be incompetent). When counsel raises the issue of the defendant's competence and requests a hearing, the court should evaluate the request in light of other objective evidence of the defendant's competence. For additional discussion, see §§63.13, 63.15–63.17.

**b. [§63.7] Retroactive Determination Not Required**

[Penal Code §1368](#) does not provide for a retroactive determination of a defendant's competence. Thus, the court does not have a duty to determine the question of competence at the time of trial when the question is tendered by defense counsel after the verdict. *People v Day* (1988) 201 CA3d 112, 120, 247 CR 68 (evidence presented to court for the first time at sentencing hearing).

**2. Procedure When Court Doubts Defendant's Competence**

**a. [§63.8] Inquiry Into Defendant's Competence**

A trial court's doubt about the defendant's competence usually arises from the defendant's erratic courtroom behavior or defense counsel's statement that the defendant is uncooperative or appears to be incompetent. The court should question the defendant to determine his or her understanding of the criminal proceedings. The court should ask, for example, whether the defendant is taking antipsychotic (psychotropic) medication for a mental or emotional disorder. An inquiry about medications may lead to information regarding the defendant's past mental health, including the name of a treating physician and whether the unusual courtroom behavior is the result of a failure to take medication.

**b. [§63.9] Stating Court's Doubt on Record**

If a doubt arises in the judge's mind about the defendant's mental competence during a proceeding before judgment, the judge must state that doubt in the record. [Pen C §1368\(a\)](#). This provision requires the trial judge, on his or her own motion, to inquire into the defendant's mental capacity to stand trial whenever evidence presented during trial or before sentencing raises a bona fide doubt. The doubt that triggers the trial judge's obligation to order a hearing is not subjective, but rather determined objectively from the record. *People v Stiltner* (1982) 132 CA3d 216, 222, 182 CR 790.

Alternatively, the court may make a [Pen C §4011.6](#) referral of the defendant to a designated 72-hour facility for evaluation and treatment under the [LPS Act \(Welf & I C §§5000–5550\)](#). In many cases, the referral and treatment will restore the defendant's competence and preclude the necessity for [Pen C §1368](#) proceedings. For a procedural checklist, see [§63.4](#). For discussion, see [§§63.78–63.84](#).

**c. [§63.10] Requesting Counsel's Opinion**

After stating the doubt in the record, the judge must ask whether defense counsel believes defendant is mentally competent. [Pen C §1368\(a\)](#). Defense counsel is not required, however, to respond to the court's inquiry. The statute merely affords counsel an opportunity to answer, and counsel's election not to take this opportunity to respond is not a basis for a contempt order. *Tarantino v Superior Court* (1975) 48 CA3d 465, 470, 122 CR 61. The opinion of counsel must include a statement of specific reasons supporting that opinion to constitute substantial evidence of incompetence. [Cal Rules of Ct 4.130\(b\)\(2\)](#).

Defense counsel's expression of an opinion of defendant's mental competence under [Pen C §1368\(a\)](#) does not violate the attorney-client privilege ([Evid C §954](#)). Although the attorney's opinion of competence may be principally drawn from confidential communications with the client, merely giving the opinion does not reveal any protected information. *People v Bolden* (1979) 99 CA3d 375, 378, 160 CR 268. However, the court may allow defense counsel to present his or her opinion regarding defendant's competency in camera if the court finds that there is reason to believe that attorney-client privileged information will be inappropriately revealed if the hearing is conducted in open court. [Cal Rules of Ct 4.130\(b\)\(2\)](#).

**d. [§63.11] Appointing Counsel and Declaring Recess**

The judge must appoint an attorney for a defendant who is not represented by counsel. [Pen C §1368\(a\)](#); *People v Powell* (1986) 180 CA3d 469, 483, 225 CR 703 (court abused discretion by failing to appoint counsel for pro per defendant who, because of cognitive impairment, was unable to call witnesses needed at trial); *People v Robinson* (2007) 151 CA4th 606, 611–616, 60 CR3d 102 (reasonable doubt as to defendant's competency to stand trial extends to defendant's competency to waive counsel and to represent himself or herself). Furthermore, at the request of the defendant or his or her counsel, or on the court's own motion, the court must recess the proceedings for as long as may be reasonably necessary to permit counsel to confer with the defendant and to form an opinion about the defendant's present mental competence. [Pen C §1368\(a\)](#). For discussion of evaluating defendant's mental capacity to waive counsel and



represent himself or herself, see California Judges Benchguide 54: *Right to Counsel Issues* (Cal CJER).

**e. [§63.12] Appointing Mental Health Expert**

Trial courts frequently order mental health examinations before deciding whether a full-scale [Pen C §1368](#) competency hearing is warranted. [Evidence Code §730](#) authorizes the trial court to appoint an expert when it appears that expert evidence is or may be required by the court or a party. Moreover, based on the constitutional right to a fair trial, a trial court must appoint an expert for an indigent defendant if the defendant shows the expert's services are reasonably necessary to his or her defense. *People v Campbell* (1987) 193 CA3d 1653, 1662, 239 CR 214; *People v Worthy* (1980) 109 CA3d 514, 520, 167 CR 402.

If there is a reasonable possibility, even if it does not rise to the level of substantial evidence, that the defendant is unable to understand the proceedings or assist in his or her own defense, the trial court must order a mental health examination before deciding there is no need for a [Pen C §1368](#) hearing. *People v Visciotti* (1992) 2 C4th 1, 35, 5 CR2d 495 (granting motion for appointment of an expert under [Evid C §730](#) before consideration by counsel and the court of whether either has a doubt about the defendant's competence); *People v Campbell, supra*, 193 CA3d at 1663 (trial court did not abuse discretion by failing to order mental health evaluation of defendant who testified coherently in "stream of consciousness" style).

A mental health expert appointed by the court should be ordered to provide a report to the court, with copies for defense counsel and the prosecutor. The purpose of the report is to guide the court in determining whether to order a competency hearing. If the hearing is ordered, one or two additional experts must be appointed and the defendant must be afforded due process rights to challenge their conclusions as part of that hearing. See [Pen C §1369](#); *People v Pennington* (1967) 66 C2d 508, 520, 58 CR 374.

**f. [§63.13] Court's Action on Counsel's Opinion**

[Penal Code §1368\(b\)](#) specifies a court's options, based on counsel's opinion regarding a defendant's competence, when the court already has expressed a doubt about the defendant's competency under [Pen C §1368\(a\)](#). It does not, however, provide an independent basis for requiring a competency hearing. See *People v Claxton* (1982) 129 CA3d 638, 667, 181 CR 281 (language of [Pen C §1368\(b\)](#) is not self-initiating; it can only be read as a response to subdivision (a)).

If counsel states that he or she believes the defendant is or may be mentally incompetent, "the court shall order that the question of the

defendant's mental competence is to be determined in a hearing which is held pursuant to [Penal Code] sections 1368.1 and 1369." Pen C §1368(b). A literal reading of this section suggests that the defendant has an absolute right to a hearing when defense counsel doubts the defendant's competence. However, this provision has been interpreted to mean that there must be objective substantial evidence of doubt about the defendant's mental competence before he or she is entitled to a full competency hearing under Pen C §1368. *People v Hayes* (1999) 21 C4th 1211, 1281, 91 CR2d 211; *People v Welch* (1999) 20 C4th 701, 737–738, 742, 85 CR2d 203.

Just as defendant's counsel is not the final arbiter of the defendant's lack of competence, a defendant's counsel's opinion that the defendant is competent is not the final determining factor. The court has discretion under Pen C §1368(b) to order a hearing based on its assessment even if counsel states that he or she believes the defendant is mentally competent. Pen C §1368(b).

Despite the discretionary nature of the language of Pen C §1368, the court must order a competency hearing, regardless of counsel's or the judge's personal opinion, when substantial evidence of the accused's incompetence has been introduced. Cal Rules of Ct 4.130(b)(1). Substantial evidence of incompetence is sufficient to require a full competency hearing even if the evidence is in conflict. *People v Welch, supra*, 20 C4th at 738. If the evidence casting doubt on an accused's present competence is less than substantial, the court has discretion in deciding whether to order a competency hearing. 20 C4th at 742.

#### g. [§63.14] Judge's Continuing Duty

The trial judge has a continuing duty to make proper inquiry regarding a defendant's capacity to stand trial or to understand the nature of the sentencing procedure. This duty may not be avoided by relying solely on a pretrial decision or pretrial psychiatric reports when, during the trial or prior to sentencing, the judge is presented with a substantial change of circumstances or with new evidence that casts a serious doubt on the validity of the pretrial finding of incompetence. *People v Tomas* (1977) 74 CA3d 75, 91, 141 CR 453 (evidence of incompetence sufficient to require hearing contained in diagnostic report prepared in connection with sentencing); *People v Zatko* (1978) 80 CA3d 534, 548, 145 CR 643 (doctor's trial testimony did not present change of circumstances or new evidence casting serious doubt on pretrial finding of present sanity). The court is obligated to initiate new Pen C §1368 proceedings, however, only if the defendant presents substantially new evidence or changed circumstances. *People v Murrell* (1987) 196 CA3d 822, 827, 242 CR 175. For discussion of situations requiring a second competency hearing, see §63.33.



### 3. Determining What Constitutes Substantial Evidence

#### a. [§63.15] General Guidelines

The question of what constitutes substantial evidence of a defendant's incompetence under Pen C §1368 cannot be answered by a simple formula applicable to all situations. *People v Laudermilk* (1967) 67 C2d 272, 283, 61 CR 644. Evidence is substantial if it raises a reasonable or bona fide doubt concerning the defendant's ability to understand the nature of the criminal proceedings against him or her or to assist in his or her defense. *People v Rogers* (2006) 39 C4th 826, 847, 48 CR3d 1; see *People v Hayes* (1999) 21 C4th 1211, 1282, 91 CR2d 211 (in penalty phase of capital murder prosecution, judge properly denied defendant's motion for competency hearing, when defense counsel had no doubt about defendant's competence, and defendant's actions as co-counsel demonstrated that he was fully aware of nature of proceedings and able to assist counsel).

Evidence of incompetence is not substantial if it raises merely a suspicion of lack of present competence but does not purport to state facts of a present lack of ability, through mental illness, to participate rationally in a trial. *People v Hayes, supra*, 21 C4th at 1281; *People v Medina* (1995) 11 C4th 694, 733, 47 CR2d 165.

As a practical matter, the substantial evidence analysis answers only the question of whether a competency hearing is mandatory or discretionary. The hearing must be ordered if there is substantial evidence of the defendant's incompetence. The court has discretion to order the hearing if the evidence is less than substantial. *People v Hale* (1988) 44 C3d 531, 540, 244 CR 114; *People v Pennington* (1967) 66 C2d 508, 518, 58 CR 374. If the court exercises this discretion by ordering a hearing, it is unlikely that this decision will be disturbed on appeal as long as the hearing is actually held. See *People v Marks* (1988) 45 C3d 1335, 1343–1344, 248 CR 874 (trial court ordered hearing based solely on defense counsel's expressed doubt about defendant's competence, but hearing was not held).

#### b. [§63.16] What Constitutes Substantial Evidence

The substantial evidence test is satisfied if a qualified mental health expert who has had sufficient opportunity to examine the accused states under oath with particularity that, in his or her professional opinion, the accused is, because of mental illness, incapable of understanding the purpose or nature of the criminal proceedings or is incapable of assisting in his or her defense or cooperating with counsel. *People v Pennington* (1967) 66 C2d 508, 519, 58 CR 374; *People v Tomas* (1977) 74 CA3d 75, 91, 141 CR 453. A single doctor's report that concludes that the defendant is incapable of standing trial, even in the face of other reports to the

contrary, is substantial evidence requiring that a [Pen C §1368](#) proceeding be instituted. *People v Burney* (1981) 115 CA3d 497, 503, 171 CR 329; *People v Zatko* (1978) 80 CA3d 534, 547–548, 145 CR 643.

**c. [§63.17] What Does Not Constitute Substantial Evidence**

Courts have held that each of the following factual situations, standing alone, did *not* present substantial evidence of doubt about defendant’s mental competence:

- Defendant’s bizarre actions or statements. *People v Welch* (1999) 20 C4th 701, 742, 85 CR2d 203. See also *People v Medina* (1995) 11 C4th 694, 735, 47 CR2d 165 (defendant’s cursing and disruptive actions required removal from the courtroom); *People v Cooks* (1983) 141 CA3d 224, 324, 190 CR 211 (bizarre answers to questions on cross-examination demonstrated hostility to prosecution and court but not incompetence to testify).
- Statements of defendant’s family that defendant suffered from migraine headaches and that he had a possible epileptic seizure when he was two or three years old; defense psychiatrist’s undetailed opinion that defendant suffered from drug dementia, and opinion based on reports from another psychiatrist that had examined defendant. *People v Rodrigues* (1994) 8 C4th 1060, 1110, 36 CR2d 235.
- Psychiatrist’s testimony that high doses of medication had been prescribed for defendant, that defendant had experienced short-term memory loss on one occasion, and that defendant may have been suffering from underlying depression. *People v Danielson* (1992) 3 C4th 691, 726, 13 CR2d 1, disapproved on other grounds in 25 C4th 1046, 1069 n13 (no evidence that defendant was so overmedicated that he could not understand the nature of the criminal proceedings or cooperate with counsel). See also *People v Medina, supra*, 11 C4th at 732 (defendant’s assertion that antipsychotic medicine concealed his incompetence was based on unsupported speculation).
- Defense counsel’s statements that defendant was incapable of cooperating in his or her defense. *People v Welch, supra*, 20 C4th at 742 (disagreement between defense counsel and defendant about which defense to employ did not require court to order competency hearing).
- Defendant’s “paranoid distrust of the judicial system,” and statements that defense counsel was in league with the prosecution. 20 C4th at 739, 742.

- Mental health expert's testimony that defendant was immature, dangerous, psychopathic, or homicidal, or similar diagnosis that includes few references to defendant's ability to assist in his or her own defense. 20 C4th at 742. See also *People v Hays* (1976) 54 CA3d 755, 760, 126 CR 770 (psychiatric reports found defendant depressed and suffering from mild psychosis but expressed no doubt about defendant's mental competence).
- Mental health report that did not express any opinion on defendant's ability to assist in defense, cooperate with counsel, or understand the purpose or nature of the criminal proceedings. *People v Beivelman* (1968) 70 C2d 60, 73, 73 CR 521 (disapproved on other grounds in 27 C3d at 33). See also *People v Leever* (1985) 173 CA3d 853, 864, 219 CR 581 (letter paraphrasing doctor's report gave no hint of doctor's opinion of competence); *People v Burney* (1981) 115 CA3d 497, 503, 171 CR 329 (medical reports related to defendant's sanity at time of offense rather than competence at trial).
- Psychiatrist's testimony that defendant appeared to be schizophrenic and delusional, which was based solely on observations of defendant's in-court demeanor, and not from any actual examination or testing of defendant. *People v Weaver* (2001) 26 C4th 876, 952–954, 111 CR2d 2.
- Counsel's statement that defendant did not understand the proceedings; psychiatrist's report that defendant showed no mental abnormality and was able to cooperate and assist trial counsel. *People v Stewart* (1979) 89 CA3d 992, 995, 153 CR 242.
- Psychiatrist's testimony that the defendant suffered some type of disassociative disorder that probably rose to the level of a multiple personality disorder; no testimony that the defendant was likely to disassociate during the trial or that the alleged disorder would interfere with defendant's ability to understand the trial process or assist defense counsel. *People v Rogers* (2006) 39 C4th 826, 848–849, 48 CR3d 1.
- Defendant's inappropriate emotional response to a serious trial; statements of stepparents that defendant's behavior during trial was strange; earlier diagnosis by a court-appointed psychiatrist that defendant had a personality disorder; the fact that defendant had suffered head injuries at an unspecified time in the past. *People v Claxton* (1982) 129 CA3d 638, 667, 181 CR 281 (counsel had declined to put on witnesses, saying his remarks alone were sufficient under [Pen C §1368\(b\)](#)). See also *People v Stiltner* (1982)

132 CA3d 216, 222, 182 CR 790 (court held that similar factors did not constitute substantial evidence).

- Defendant’s acts of pleading guilty to a capital offense and waiving a jury trial, allegedly amounting to a suicide attempt; defendant’s waiver of a penalty jury. *People v Deere* (1985) 41 C3d 353, 359, 222 CR 13 (disapproved on other grounds in 48 C3d at 1228 n9). See also *People v Howard* (1992) 1 C4th 1132, 1164, 5 CR2d 268 (defendant’s decision not to argue in favor of life imprisonment or present mitigating evidence).
- Psychiatrist’s testimony that defendant suffered permanent amnesia of the events surrounding the criminal offense. *People v Amador* (1988) 200 CA3d 1449, 246 CR 605.
- Testimony of two psychiatrists that defendant was unable to tolerate stressful situations and that the stress of a trial would make it difficult for him to testify on his own behalf; counsel’s statements that defendant could not retain information long enough to prepare his testimony. *People v Frye* (1998) 18 C4th 894, 948–953, 77 CR2d 25.
- Defendant’s assertion that he was “mentally” absent because his chronic back pain and associated symptoms prevented him from concentrating on the proceedings or communicating with counsel; defendant was lucid, coherent, and rational, and the court reasonably accommodated the special needs of the defendant. *People v Avila* (2004) 117 CA4th 771, 778–781, 11 CR3d 894.

Even though no single factor constitutes substantial evidence, several factors in combination may support a reasonable inference of lack of present mental capacity within the meaning of [Pen C §§1367–1368](#). See *People v Humphrey* (1975) 45 CA3d 32, 38, 119 CR 74 (evidence supporting reasonable inference of lack of present competence required trial court to order hearing).

#### 4. [§63.18] Suspension of Proceedings

When substantial evidence appears, a doubt about the competence of the accused exists, no matter how persuasive other evidence may be to the contrary, and the trial court must order a [Pen C §1368](#) competency hearing. Once the court has ordered a competency hearing, the criminal proceedings must be suspended until a trial on defendant’s competency has been concluded and the defendant either is found mentally competent or has his or her competency restored under [Pen C §1372](#) (see [§63.73](#)). [Pen C §1368\(c\)](#); [Cal Rules of Ct 4.130\(c\)\(1\)](#); *People v Hale* (1988) 44 C3d 531, 540, 244 CR 114 (court is divested of jurisdiction to proceed pending express determination of competence). Furthermore, neither the

defendant nor counsel can waive the question of competence after substantial evidence of incompetence has been presented and the competency hearing has been ordered. 44 C3d at 541.

When the criminal proceedings are suspended, and a jury has been impaneled and sworn to try the defendant, the court must discharge the jury only if it appears to the court that undue hardship would result if the jury is retained on call. [Pen C §1368\(c\)](#).

## 5. Hearing Specified Matters During Suspension

### a. [§63.19] Demurrer, Suppression Motion, and Motion To Dismiss

Proceedings to determine mental competence must be held before the filing of an information unless defense counsel requests a preliminary hearing under [Pen C §859b](#). [Pen C §1368.1\(a\)](#); [Cal Rules of Ct 4.130\(b\)\(3\)](#). At the preliminary hearing, defense counsel may demur, move to dismiss the felony complaint, or move to suppress evidence under [Pen C §1538.5](#). [Pen C §1368.1\(a\)](#). When ruling on a demurrer or motion, the court may hear any matter that is capable of fair determination without the defendant's personal participation. [Pen C §1368.1\(c\)](#).

The court should be cautious in evaluating a defense request for a preliminary hearing before the defendant's competence has been determined. A preliminary hearing held when the defendant is mentally incompetent deprives the defendant of due process. *People v Duncan* (2000) 78 CA4th 765, 93 CR2d 173; *Chambers v Municipal Court* (1974) 43 CA3d 809, 813, 118 CR 120. When the defendant is determined to be incompetent after the filing of the information, defense counsel may move to set aside the information under [Pen C §995](#) after the defendant has been restored to competence. If defense counsel can establish at an evidentiary hearing on the motion that the defendant was mentally incompetent during the preliminary hearing, the motion must be granted and a second preliminary hearing must be held after the filing of a new information. *People v Duncan, supra*; *Bayramoglu v Superior Court* (1981) 124 CA3d 718, 729, 176 CR 487; *Miller v Superior Court* (1978) 81 CA3d 132, 146 CR 253. But see *Booth v Superior Court* (1997) 57 CA4th 91, 95, 66 CR2d 758 (defendant found incompetent three months after defendant held to answer; if no doubt about competence raised at preliminary hearing, defendant presumed competent and legally committed by magistrate).

Similar caution should be used when ruling on related matters under [Pen C §1368.1\(c\)](#). The statute does not specify what matters are "capable of fair determination without the personal participation of the defendant." The court should not place itself in the position of adjudicating matters

that may later prove to have been invalid because of the defendant's incompetence.

**b. [§63.20] Conditional Examination of Witness**

In exercising its inherent discretion to control the criminal proceedings before it, the court may allow a conditional examination to be taken of a witness before proceeding with a competency hearing if extraordinary circumstances so warrant. *People v Cadogan* (2009) 173 CA4th 1502, 1509–1513, 93 CR3d 881 (court upheld examination of defendant's wife who was terminally ill and not likely to survive until trial; defendant's intransigence caused significant delay in holding of competency hearing). If a conditional examination is taken and it is later determined that the defendant was incompetent at the time of the examination, it may not be admitted at trial. 173 CA4th at 1513.

**c. [§63.21] Substitution of Counsel; Self-Representation**

*Substitution of Counsel.* The court may hear a motion for substitution of counsel (*Marsden* motion) before proceeding with a competency hearing. *People v Stankewitz* (1990) 51 C3d 72, 89, 270 CR 817; *People v Solorzano* (2005) 126 CA4th 1063, 24 CR3d 735 (defendant entitled to new trial when trial court refused to hear his motion for substitution of counsel while competency hearing was pending).

*Self-Representation.* However, the court may not hear a motion for self-representation (*Faretta* motion). *People v Horton* (1995) 11 C4th 1068, 1108, 47 CR2d 516. See also *People v Hightower* (1996) 41 CA4th 1108, 1116, 49 CR2d 40 (competency standards for waiving right to counsel and standing trial are same). In *Indiana v Edwards* (2008) \_\_\_ US \_\_\_, 128 S Ct 2379, 2383–2388, 171 L Ed 2d 345, the U.S. Supreme Court held that the federal Constitution permits states to insist on representation by counsel for defendants competent enough to stand trial but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings themselves. Although *Edwards* holds that states may set a higher or different competence standard for self-representation than for trial with counsel, California has not done so. *People v Taylor* (2009) 47 C4th 850, 874–875, 102 CR3d 852.

For a comprehensive discussion of motions for substitution of counsel and pro per motions, see California Judges Benchguide 54: *Right to Counsel Issues* (Cal CJER).

**6. [§63.22] Appointment of Experts/Evaluation of Defendant**

Before the hearing, the court must inquire whether the defendant or defense counsel seeks a finding of mental incompetence. Cal Rules of Ct 4.130(d)(1). If the defendant or defense counsel informs the court that the



defendant is seeking a finding of mental incompetence, the court must appoint at least one psychiatrist or licensed psychologist, and any other expert the court may deem appropriate, to examine the defendant. [Pen C §1369\(a\)](#); [Cal Rules of Ct 4.130\(d\)\(1\)\(A\)](#). If the defendant or defense counsel informs the court that the defendant is not seeking a finding of mental incompetence, the court must appoint two psychiatrists, licensed psychologists, or a combination of the two. [Pen C §1369\(a\)](#); [Cal Rules of Ct 4.130\(d\)\(1\)\(B\)](#). In this case, the defense and the prosecution may each name one of the psychiatrists or licensed psychologists. [Pen C §1369\(a\)](#); [Cal Rules of Ct 4.130\(d\)\(1\)\(B\)](#). When the defendant personally claims that he or she is competent, but defense counsel seeks a finding of incompetence, the court should appoint two experts. *People v Harris* (1993) 14 CA4th 984, 996, 18 CR2d 92. If the defendant desires to present testimony of a psychiatrist or psychologist of his or her own choosing, the court may not place conditions on the admission of the testimony, such as cooperation with the court-appointed psychiatrist or requiring that no public funds be used to hire the defendant's psychiatrist. *People v Mayes* (1988) 202 CA3d 908, 248 CR 899.

The examining psychiatrists or psychologists must evaluate the nature of the defendant's mental disorder, if any, and the defendant's ability or inability to understand the nature of the criminal proceedings or assist counsel in presenting a defense in a rational manner. [Pen C §1369\(a\)](#). The reports of the examining psychiatrists or psychologists must be submitted to the court, defense counsel, and the prosecutor. [Cal Rules of Ct 4.130\(d\)\(2\)](#).

Regardless of the conclusions or findings of the court-appointed psychiatrist or psychologist, the court that has initiated mental competency proceedings under [Cal Rules of Ct 4.130\(b\)](#) must conduct a trial on the defendant's competency. [Cal Rules of Ct 4.130\(e\)\(1\)](#).

The court has authority under the Code of Civil Procedure to order the defendant to submit to a mental examination given by a prosecution expert. [CCP §2019\(a\)\(4\)](#); *Baqleh v Superior Court* (2002) 100 CA4th 478, 488–492, 122 CR2d 673 (civil nature of competency hearing vests trial court with authority to use appropriate rules set forth in the Code of Civil Procedure, including civil discovery statutes). For a discussion of sanctions for failure to comply with an order to submit to an examination issued under [CCP §2019\(a\)\(4\)](#), see [§63.26](#).

If the court suspects that the defendant is developmentally disabled, the following procedures should be observed ([Pen C §1369\(a\)](#)):

- The court must appoint the director of the regional center for the developmentally disabled to examine the defendant.
- The court may order the developmentally disabled defendant to be confined for examination in a residential facility or state hospital.

- The regional center director must recommend to the court a suitable facility or hospital, and the court must consider the recommendation before making its confinement order.
- The defendant must receive necessary care and treatment during his or her confinement.

**a. [§63.23] Appropriateness of Antipsychotic Medication**

In addition to evaluating the defendant's competence to stand trial, the examining psychiatrists or licensed psychologists must evaluate whether treatment with antipsychotic medication is medically appropriate for the defendant and whether antipsychotic medication is likely to restore the defendant to mental competence. [Pen C §1369\(a\)](#).

If an examining psychologist is of the opinion that antipsychotic medication may be medically appropriate for the defendant and that the defendant should be evaluated by a psychiatrist to determine if antipsychotic medication is medically appropriate, the psychologist must inform the court of this opinion and his or her recommendation as to whether a psychiatrist should examine the defendant. [Pen C §1369\(a\)](#).

The examining psychiatrists or licensed psychologists must also address the issues of whether the defendant has capacity to make decisions regarding antipsychotic medication and whether the defendant is a danger to self or others. If the defendant is examined by a psychiatrist and the psychiatrist forms an opinion as to whether treatment with antipsychotic medication is medically appropriate, the psychiatrist must inform the court of his or her opinions as to the likely or potential side effects of the medication, the expected efficacy of the medication, possible alternative treatments, and whether it is medically appropriate to administer antipsychotic medication in the county jail. [Pen C §1369\(a\)](#).

The court may order the administration of antipsychotic medications in county jails to defendants found to be mentally incompetent and unable to provide informed consent. See [Pen C §1369.1\(a\)](#). As expressed in [Section 1 of Stats 2007, ch 556](#) (SB 568), the purpose of [Pen C §1369.1](#) is to ensure timely and humane access to court-approved psychiatric medications to defendants being held in jail and awaiting transfer to a state psychiatric hospital for restoration of competency.

- **JUDICIAL TIP:** Although [Pen C §1369\(a\)](#) authorizes the appointment of either psychiatrists or psychologists, the court may prefer to appoint psychiatrists only. Psychiatrists are licensed to evaluate and prescribe medications, but psychologists generally are not.



**b. [§63.24] Use of Defendant's Statements in Subsequent Proceedings**

Neither the statements made by a defendant to a psychiatrist appointed under [Pen C §1369](#), nor any evidence derived from these statements may be used by the prosecution to prove its case-in-chief as to either defendant's guilt or penalty. [Cal Rules of Ct 4.130\(d\)\(3\)](#); *People v Jablonski* (2006) 37 C4th 774, 802–804, 38 CR3d 98; *People v Arcega* (1982) 32 C3d 504, 520, 186 CR 94. And statements made during competency examinations may not be used to impeach the defendant if he or she testifies at trial. *People v Pokovich* (2006) 39 C4th 1240, 1246–1253, 48 CR3d 158. However, when the defendant places his or her mental state in issue, the statements to the court-appointed psychiatrist are admissible at the guilt phase of the trial. *People v McPeters* (1992) 2 C4th 1148, 1190, 9 CR2d 834; *People v Williams* (1988) 44 C3d 883, 934, 245 CR 336.

This rule of immunity in competency proceedings extends to statements to employees of health facilities charged with restoring the defendant's competency under [Pen C §1370](#). *In re Hernandez* (2006) 143 CA4th 459, 475–476, 49 CR3d 301 (defense counsel committed prejudicial error at sanity phase of trial by failing to object to testimony of prosecution's expert witness whose opinion of defendant's mental state was based on defendant's statements to that expert during interviews and testing conducted while defendant was confined to state hospital under [Pen C §1370\(a\)\(1\)\(B\)\(i\)](#)).

**c. [§63.25] Presence of Defense Counsel During Examination**

The court may permit defense counsel to be present as an observer at the defendant's examination if the examining psychiatrist does not object. *In re Spencer* (1965) 63 C2d 400, 413, 46 CR 753. However, a defendant is not entitled to have his or her counsel present provided the following conditions are met:

- Counsel is informed of the appointment of psychiatrists.
- The court-appointed psychiatrists are not permitted to testify at the guilt phase unless the defendant places his or her mental condition in issue.
- If the defendant places his or her mental condition in issue and the psychiatrist testifies, the court instructs the jury that the testimony about the defendant's incriminating statements should not be regarded as proof of the facts disclosed by the statements, but may be considered only for the purpose of showing the information on which the psychiatrist based his or her opinion. *In re Spencer*,

*supra*, 63 C2d at 412; *Tarantino v Superior Court* (1975) 48 CA3d 465, 469, 122 CR 61; CALCRIM 360. See also *Baqleh v Superior Court* (2002) 100 CA4th 478, 503–505, 122 CR2d 673 (defendant has no Sixth Amendment right to counsel at examination; judicially declared rule of immunity that prohibits use at trial of information obtained at examination protects the interest that might otherwise entitle defendant to counsel’s presence at examination).

**d. [§63.26] Consequences of Refusal To Submit to Examination**

If the defendant refuses to submit to a mental examination by a prosecution expert when properly ordered to do so under the provisions of the *Civil Discovery Act* (CCP §§2016–2036), the court may impose issue and evidence sanctions under CCP §2032(f), which includes disclosure to a jury of the defendant’s refusal. *Baqleh v Superior Court* (2002) 100 CA4th 478, 506, 122 CR2d 673.

**e. [§63.27] Stipulated Hearing on Doctors’ Reports**

A formal adversary hearing on the issue of competence is not required if the prosecutor and defense counsel stipulate that the competency determination be made by the court based on the written reports of the court-appointed psychiatrists. *People v Weaver* (2001) 26 C4th 876, 903–905, 111 CR2d 2; *People v McPeters* (1992) 2 C4th 1148, 1169, 9 CR2d 834 (counsel’s waiver of rights attendant to formal hearing does not violate defendant’s due process rights).

- **JUDICIAL TIP:** When proceedings are suspended, courts routinely order the defendant back in court within two to three weeks to review the reports and determine if the parties will stipulate to the finding(s) of the psychiatrist(s). If the parties stipulate, the court makes a finding of competency or incompetency. If the parties do not stipulate, the court then sets a date for a formal competency hearing.

**C. Competency Hearing**

**1. [§63.28] Hearing Judge**

There is no requirement that the competency hearing be held before the same judge who declared a doubt about the defendant’s competence to stand trial. *People v Hill* (1967) 67 C2d 105, 113, 60 CR 234. In fact, competency proceedings are commonly assigned to another department and judge for hearing. See *People v Lawley* (2002) 27 C4th 102, 133–134, 115 CR2d 614.

## 2. [§63.29] Right to Jury Trial

A competency hearing is a special proceeding rather than a criminal action, and the defendant has only a statutory, not a constitutional, right to a jury trial of the competency issue. [Pen C §1369](#); *People v Hill* (1967) 67 C2d 105, 114, 60 CR 234. See also *Baqleh v Superior Court* (2002) 100 CA4th 478, 490–491, 122 CR2d 673 (civil nature of competency hearing vests trial court with authority to use rules applicable to civil proceedings). A defendant must request a jury trial, and absent that request, the court is under no duty to advise the defendant of that right if the defendant is represented by counsel. *People v Hill, supra*, 67 C2d at 114. If the prosecution requests a jury trial, the court must grant that request, even if the defendant requests a court trial. *People v Superior Court (McPeters)* (1985) 169 CA3d 796, 215 CR 482.

Because the defendant's competence is in doubt and the defendant cannot be entrusted to make basic decisions regarding the conduct of the competency hearing, defense counsel may waive the defendant's right to a jury trial, and make other decisions regarding a jury trial, even over the defendant's objection. *People v Masterson* (1994) 8 C4th 965, 970, 35 CR2d 679 (counsel stipulated to use of an 11-person jury over defendant's objection). See also *People v MCPeters* (1992) 2 C4th 1148, 1168, 9 CR2d 834 (defense counsel's decision to submit competency issue based on stipulated record did not violate defendant's rights).

Because a competency hearing is a special proceeding that is civil in nature, the parties to the hearing are entitled only to the number of peremptory challenges provided for in civil trials ([CCP §231](#)), even if the underlying crime is punishable by death or life imprisonment. *People v Stanley* (1995) 10 C4th 764, 807, 42 CR2d 543.

## 3. [§63.30] Presumption of Competence; Burden of Proof

The defendant is presumed competent at the start of the competency hearing. [Pen C §1369\(f\)](#). The burden is on the defendant to prove his or her incompetence to stand trial by a preponderance of the evidence. [Pen C §1369\(f\)](#); [Cal Rules of Ct 4.130\(e\)\(2\)](#); *Medina v California* (1992) 505 US 437, 112 S Ct 2572, 120 L Ed 2d 353; *People v Medina* (1990) 51 C3d 870, 885, 274 CR 849 (presumption and burden of proof under [Pen C §1369\(f\)](#) do not violate due process); [CALCRIM 3451](#). However, the prosecution may present evidence of the defendant's mental incompetence if the defense declines to do so. [Pen C §1369\(b\)\(2\)](#). In this case, the burden of proof falls on the prosecution. [Cal Rules of Ct 4.130\(e\)\(2\)](#); *People v Mixon* (1990) 225 CA3d 1471, 1484 n12, 275 CR 817 (burden of proof falls on party who challenges presumption).

When neither the prosecution nor the defendant seeks a finding of incompetence, the trial court may take the initiative and assume the burden

of producing evidence of incompetence. *People v Skeirik* (1991) 229 CA3d 444, 459, 280 CR 175. When the court produces evidence of incompetence, it should instruct the jurors on the legal standard they are to apply to the evidence without allocating the burden of proof to either the defendant or the prosecution. 229 CA3d at 460.

#### 4. [§63.31] Presentation of Evidence

Penal Code §1369 outlines the procedure for the presentation of evidence in a competency hearing:

- Defense counsel offers evidence of defendant's mental incompetence. Pen C §1369(b)(1). If defense counsel does not offer such evidence, the prosecutor may do so. Pen C §1369(b)(2).
- The prosecutor offers evidence of defendant's present mental competence. Pen C §1369(c).
- Each party may offer rebuttal testimony, unless the court, for good reason and in the furtherance of justice, also permits other evidence in support of the original contention. Pen C §1369(d).
- The prosecution makes its final argument, followed by the defense counsel's final argument. The parties may submit the case without final argument. Pen C §1369(e).

Defense counsel may present evidence of the defendant's incompetence even when the defendant desires to be found competent. *People v Stanley* (1995) 10 C4th 764, 804, 42 CR2d 543; *People v Bolden* (1979) 99 CA3d 375, 379, 160 CR 268 (defense counsel must advocate the position that he or she perceives to be in the defendant's best interests even when that interest conflicts with the defendant's stated position). In that event, the court should allow the defendant to testify as to his or her own present competence, unless it separately determines that the defendant is incompetent to do so. *People v Harris* (1993) 14 CA4th 984, 993, 18 CR2d 92. Such conflict does not establish sufficient grounds to warrant substitution of counsel (*Shephard v Superior Court* (1986) 180 CA3d 23, 33, 225 CR 328) or the appointment of second counsel to oppose commitment (*People v Jernigan* (2003) 110 CA4th 131, 135–137, 1 CR3d 511).

The common forms of evidence introduced in a competency hearing include:

- Testimony of psychiatrists or psychologists appointed under Pen C §1369(a), including testimony of experts critical of other expert testimony.

- Testimony of additional experts or relevant witnesses called by defense counsel or the prosecutor in addition to the psychiatrists or psychologists appointed by the court. [Cal Rules of Ct 4.130\(e\)\(3\)](#).
- Testimony of the defense attorney. (*Note:* Because the defendant is presumed competent, he or she may prevent defense counsel from testifying by asserting the attorney-client privilege in the absence of any evidence that the defendant is incapable of asserting the privilege. *People v Mickle* (1991) 54 C3d 140, 184, 286 CR 511.)
- Testimony of lay witnesses about defendant's behavior. [Evid C §800](#); *People v Medina* (1990) 51 C3d 870, 887, 274 CR 849 (peace officer's testimony that defendant was responsive during conversation); *People v Marshall* (1997) 15 C4th 1, 30, 61 CR2d 84 (jail deputy's testimony that defendant acted in rational manner and conversed normally in lockup facility).
- Nontestimonial behavior of the defendant in the courtroom. *People v Prince* (1988) 203 CA3d 848, 856, 250 CR 154
- Records of hospitalization or other treatment for defendant's mental condition, police reports, school records, and reports from other professional personnel, such as social workers and probation officers. *People v Rodrigues* (1994) 8 C4th 1060, 1109, 36 CR2d 235.

## 5. [§63.32] Verdict and Findings

When the competency issue is tried by the jury, the court must instruct the jury on all matters of law necessary to render a verdict. [Pen C §1369\(f\)](#). The verdict of the jury must be unanimous and supported by substantial evidence. [Pen C §1369\(f\)](#); [Cal Rules of Ct 4.130\(e\)\(4\)\(A\)](#); *People v Samuel* (1981) 29 C3d 489, 505, 174 CR 684. The court may reverse a jury verdict of competence and render a judgment notwithstanding the verdict under [CCP §629](#) if the court finds that there is no substantial evidence to support the verdict. *People v Conrad* (1982) 132 CA3d 361, 182 CR 912.

If the defendant is found mentally competent, the criminal proceedings will resume, the trial on the charged offense(s) will proceed, and judgment may be pronounced if the defendant is convicted of the offense(s). [Pen C §§1370\(a\)\(1\)\(A\), 1370.01\(a\)\(1\)](#); [Cal Rules of Ct 4.130\(f\)\(1\)](#). For discussion of calculating time when criminal proceedings are reinstated, see [§63.77](#).

When the defendant is found mentally incompetent, the criminal proceedings remain suspended, and the court must order the defendant confined to a treatment facility or placed on outpatient status. [Pen C §§1370\(a\)\(1\)\(B\)\(i\), 1370.01\(a\)\(1\)](#); [Cal Rules of Ct 4.130\(f\)\(2\)](#). If the court

has not already done so, it must discharge any jury impaneled and sworn to try the defendant. [Pen C §1368\(c\)](#).

When the issue of competence is decided by the trial court, the court must expressly state on the record, either orally or in writing, its determination whether the defendant is mentally competent to stand trial, as well as the evidence considered and the reasoning in support of its finding. [Cal Rules of Ct 4.130\(e\)\(4\)\(B\)](#); *People v Marks* (1988) 45 C3d 1335, 1343, 248 CR 874.

#### 6. [§63.33] Situations Requiring Second Hearing

When a competency hearing has already been held and the defendant has been found competent to stand trial, the court is not required to hold a second competency hearing unless it is presented with a substantial change of circumstances or with new evidence casting a serious doubt on the validity of the competency finding. *People v Taylor* (2009) 47 C4th 850, 863–864, 102 CR3d 852; *People v Lawley* (2002) 27 C4th 102, 136, 115 CR2d 614; *People v Kaplan* (2007) 149 CA4th 372, 383–387, 57 CR3d 143 (court erred in not ordering second competency hearing when defendant’s mental condition had deteriorated since the first hearing as a result of a significant change in defendant’s psychotropic medications). The court may take its personal observations of the defendant into account in determining whether there has been significant change in the defendant’s mental state. *People v Jones* (1991) 53 C3d 1115, 1153, 282 CR 465.

#### 7. [§63.34] Consequences of Erroneous Denial of Hearing

An erroneous denial of a competency hearing compels reversal of the judgment, because the trial court has no power to proceed with the trial once a doubt arises about the defendant’s competence. *People v Pennington* (1967) 66 C2d 508, 521, 58 CR 374. The error is per se prejudicial and may not be cured by a retrospective determination of the defendant’s mental competence during trial. *People v Stankewitz* (1982) 32 C3d 80, 94, 184 CR 611. However, several appellate cases have held that retrospective competency hearings may be appropriate in rare cases when there is sufficient evidence of a defendant’s mental state at the time of trial on which to base a subsequent competency determination. See *People v Ary* (2004) 118 CA4th 1016, 1025–1029, 13 CR3d 482 (case remanded to trial court for a determination of whether retrospective hearing should be held; trial court record contained information potentially relevant to a competency hearing, *i.e.*, extensive expert testimony regarding defendant’s mental retardation presented at a pretrial hearing on the defendant’s competence to waive his *Miranda* rights and the voluntariness of his confession); *People v Kaplan* (2007) 149 CA4th 372,

387–389, 57 CR3d 143 (case remanded to trial court for a determination of whether retrospective hearing should be held; court record contained reports from two psychiatrists addressing the competency of the defendant at the beginning of trial; either or both psychiatrists might be available to explain or elaborate on the observations and conclusions set forth in their reports at a retrospective competency hearing); *People v Robinson* (2007) 151 CA4th 606, 617–618, 60 CR3d 102 (case remanded to trial court for a retrospective competency hearing; disputed competency hearing occurred only two years previously; trial record contained both expert’s report on defendant’s mental competence at that time and statements by defendant from which his mental competence could be assessed).

#### **D. Commitment to Treatment Facility or Outpatient Status Placement**

##### **1. [§63.35] Evaluation by Community Program Director**

If the defendant is found mentally incompetent, the court must order that the defendant be admitted to a state hospital, a private or public treatment facility, or placed on outpatient status. [Pen C §1370\(a\)\(1\)\(B\)\(i\)](#). However, before making its commitment order, the court must order the community program director (or designee) to evaluate the defendant and submit to the court within 15 judicial days of the order a written recommendation as to whether the defendant should be placed on outpatient status or committed to a state hospital or other treatment facility. [Pen C §1370\(a\)\(2\)\(A\)](#). A defendant may not undergo any form of treatment without first being evaluated by the community program director (or designee). [Pen C §1370\(a\)\(2\)\(A\)](#).

##### **2. Administration of Antipsychotic Medication**

###### **a. [§63.36] Voluntary Treatment**

The court must hear and determine whether the defendant, with advice of his or her counsel, consents to the administration of antipsychotic medication. If the defendant consents, the court order of commitment must include confirmation that antipsychotic medication may be given to the defendant as prescribed by a treating psychiatrist pursuant to the defendant’s consent. [Pen C §1370\(a\)\(2\)\(B\)\(i\)](#).

The commitment order must also indicate that if the defendant withdraws consent for antipsychotic medication, after the treating psychiatrist complies with the provisions under [Pen C §1370\(a\)\(2\)\(C\)](#), the defendant must be returned to court for a hearing in accordance with [Pen C §1370\(a\)\(2\)\(B\)\(ii\)](#) regarding whether antipsychotic medication shall be administered involuntarily. [Pen C §1370\(a\)\(2\)\(B\)\(i\)](#). See §63.37.



**b. [§63.37] Involuntary Treatment**

If the defendant does not consent to the administration of antipsychotic medication, the court must hear and determine whether any of the following is true (Pen C §1370(a)(2)(B)(ii)):

- The defendant lacks capacity to make decisions regarding antipsychotic medication, the defendant's mental disorder requires medical treatment with antipsychotic medication, and if the defendant's mental disorder is not treated with antipsychotic medication, it is probable that serious harm to the physical or mental health of the patient will result. Probability of serious harm to the physical or mental health of the defendant requires evidence that the defendant is presently suffering adverse effects to his or her physical or mental health, or the defendant has previously suffered these effects as a result of a mental disorder, and his or her condition is substantially deteriorating. The fact that a defendant has a diagnosis of a mental disorder does not alone establish probability of serious harm to the physical or mental health of the defendant. Pen C §1370(a)(2)(B)(ii)(I).
- The defendant is a danger to others, in that the defendant has inflicted, attempted to inflict, or made a serious threat to inflict substantial physical harm on another while in custody, or the defendant had inflicted, attempted to inflict, or made a serious threat to inflict substantial physical harm on another that resulted in his or her being taken into custody, and the defendant presents, as a result of mental disorder or mental defect, a demonstrated danger of inflicting substantial physical harm on others. Demonstrated danger may be based on an assessment of the defendant's present mental condition, including a consideration of past behavior of the defendant within six years before the time the defendant last attempted to inflict, inflicted, or threatened to inflict substantial physical harm on another, and other relevant evidence. Pen C §1370(a)(2)(B)(ii)(II).
- The defendant has been charged with a serious crime; involuntary administration of antipsychotic medication is substantially likely to render the defendant competent to stand trial; the medication is unlikely to have side effects that interfere with the defendant's ability to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a reasonable manner; less intrusive treatments are unlikely to have substantially the same results; and antipsychotic medication is in the patient's best medical interest in light of his or her medical condition. Pen C §1370(a)(2)(B)(ii)(III).



*Note:* Penal Code §1370(a)(2)(B)(ii)(III) complies with the holding in *Sell v U.S.* (2003) 539 US 166, 123 S Ct 2174, 156 L Ed 2d 197. See *People v O'Dell* (2005) 126 CA4th 562, 569–572, 23 CR3d 902; see also *Carter v Superior Court* (2006) 141 CA4th 992, 1001, 46 CR3d 507 (trial court order authorizing state hospital to involuntarily administer antipsychotic medication not supported by substantial evidence; trial court's order did not meet *Sell* criteria or comply with Pen C §1370(a)(2)(B)(ii)(III)); *People v McDuffie* (2006) 144 CA4th 880, 887–888, 50 CR3d 794 (evidence showing defendant had 50 to 60 percent chance of being restored to competency if treated with recommended antipsychotic medication does not meet “substantial likelihood” standard adopted by Pen C §1370(a)(2)(B)(ii)(III)).

If the court finds any of the conditions described in Pen C §1370(a)(2)(B)(ii) to be true, the court must issue an order authorizing the treatment facility to involuntarily administer antipsychotic medication to the defendant when and as prescribed by the defendant's treating psychiatrist. However, the court may order involuntary administration of antipsychotic medication under the conditions described in Pen C §1370(a)(2)(B)(ii)(III) only if the defendant does not lack capacity to make decisions regarding antipsychotic medication and is not a danger to others, within the meaning of Pen C §1370(a)(2)(B)(ii)(I) and (II). Pen C §1370(a)(2)(B)(iii); *People v O'Dell*, *supra*, 126 CA4th at 570 n3.

In all cases, the treating hospital, facility, or program may administer medically appropriate antipsychotic medication prescribed by a psychiatrist in an emergency as defined in Welf & I C §5008(m). Pen C §1370(a)(2)(B)(iv).

If the defendant consented to antipsychotic medication as described in Pen C §1370(a)(2)(B)(i), but subsequently withdraws his or her consent, *or*, if involuntary antipsychotic medication was not ordered under Pen C §1370(a)(2)(B)(ii), and the treating psychiatrist determines that antipsychotic medication has become medically necessary and appropriate, the treating psychiatrist must make efforts to obtain informed consent from the defendant for antipsychotic medication. Pen C §1370(a)(2)(C). If informed consent is not obtained from the defendant, and the treating psychiatrist is of the opinion that the defendant lacks capacity to make decisions regarding antipsychotic medication as described in Pen C §1370(a)(2)(B)(ii)(I), *or* that the defendant is a danger to others as described in Pen C §1370(a)(2)(B)(ii)(II), the committing court must be provided notice and an assessment of the current mental status of the defendant and the opinion of the treating psychiatrist that involuntary antipsychotic medication has become medically necessary and appropriate. Pen C §1370(a)(2)(C). The court must provide notice to the prosecutor and to defense counsel and must set a hearing to determine

whether involuntary antipsychotic medication should be ordered in the manner described in [Pen C §1370\(a\)\(2\)\(B\)](#). [Pen C §1370\(a\)\(2\)\(C\)](#).

### 3. [§63.38] Commitment Order

After reviewing the placement recommendation of the community program director (or designee), the court must order that:

- The defendant be placed on outpatient status in, or delivered by the sheriff to, a state hospital for the care and treatment of the mentally disordered or an available public or private treatment facility approved by the community program director that will promote the defendant's restoration to mental competence ([Pen C §1370\(a\)\(1\)\(B\)\(i\)](#)); *and*
- On receiving a copy of the filing of a certificate of restoration of competence, the sheriff must return the defendant to the court without any further order from the court ([Pen C §1370\(a\)\(1\)\(C\)](#)).

The commitment order exonerates any bail bond, undertaking, or deposit on file by or on behalf of the defendant. [Pen C §1371](#).

### 4. [§63.39] Documentation To Accompany Defendant

When the court orders that the defendant be confined to a state hospital or other treatment facility, the court must provide copies of the following documents that must accompany the defendant to the treatment facility ([Pen C §1370\(a\)\(3\)](#)):

- The commitment order, including a specification of the charges.
- A computation or statement indicating the maximum term of commitment in accordance with [Pen C §1370\(c\)](#) (see [§63.43](#)).
- A computation or statement indicating any amount of credit for time served to be deducted from the maximum term of commitment (see [§63.43](#)).
- State's summary criminal history information.
- Any arrest reports prepared by the police department or other law enforcement agency.
- Any court-ordered psychiatric examination or evaluation reports.
- The community program director's placement recommendation report.
- Records of any finding of mental incompetence under [Pen C §§1367–1375.5](#), arising out of a complaint charging a felony sex offense specified in [Pen C §290](#), or any pending [Pen C §1368](#) proceeding arising out of a charge of a [Pen C §290](#) offense.

### 5. [§63.40] Transfer of Defendant to Another Facility

The court may, on receiving a written recommendation of both the community program director and the medical director of the state hospital, transfer a defendant initially committed to a state hospital to an approved treatment facility. [Pen C §1370\(a\)\(6\)\(A\)](#). If the defendant was initially committed to a treatment facility, the court may transfer the defendant to a state hospital or to another approved treatment facility on the recommendation of the community program director. [Pen C §1370\(a\)\(6\)\(A\)](#). The court must notify the defendant, defense counsel, the prosecuting attorney, and the community program director (or designee) before making a transfer order. [Pen C §1370\(a\)\(6\)\(A\)](#).

The prosecutor or the defendant may contest the transfer order by filing a petition with the court for a hearing, which must be held if the court determines that sufficient grounds exist. [Pen C §1370\(a\)\(6\)\(A\)](#). At the hearing, the prosecutor or the defendant may present evidence bearing on the transfer order. The court must employ the same standards that are used in conducting probation revocation hearings under [Pen C §1203.2](#). [Pen C §1370\(a\)\(6\)\(A\)](#). For a discussion of probation revocation hearings, see California Judges Benchguide 84: *Probation Revocation* (Cal CJER).

### 6. [§63.41] Outpatient Status Placement

A defendant may be placed on outpatient status by order of the court in accordance with the procedures contained in [Pen C §§1600–1620](#). [Pen C §1370\(a\)\(1\)\(B\)\(i\)](#). For discussion of these procedures see [§§63.49–63.54](#).

### 7. [§63.42] Progress Reports

The medical director of the state hospital or other treatment facility must provide to the court and the community program director (or designee) a written report addressing the defendant's progress toward recovery of mental competence within 90 days of the commitment order. [Pen C §1370\(b\)\(1\)](#). If the defendant is on outpatient status, the outpatient treatment staff must provide a written progress report to the community program director, and the director must report to the court within the 90-day period. [Pen C §1370\(b\)\(1\)](#).

The report must include a description of any antipsychotic medication administered to the defendant and its effects and side effects, including effects on the defendant's appearance or behavior that would affect the defendant's ability to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a reasonable manner. [Pen C §1370\(a\)\(2\)\(B\)\(v\)](#).

If the defendant has not recovered mental competence, but the report indicates a substantial likelihood that the defendant will regain mental

competence in the foreseeable future, the defendant must remain in the state hospital, treatment facility, or on outpatient status. [Pen C §1370\(b\)\(1\)](#).

Subsequent written progress reports (following above procedure) must follow at six-month intervals or until the defendant becomes mentally competent. [Pen C §1370\(b\)\(1\)](#). The court must provide copies of all progress reports to the prosecutor and defense counsel. [Pen C §1370\(b\)\(1\), \(c\)\(4\)](#).

On review of each progress report, the court must determine if the security level of housing and treatment is appropriate and may make an order in accordance with its determination. [Pen C §1370\(b\)\(4\)](#).

#### **8. [§63.43] Duration of Commitment; Credit for Precommitment Confinement**

The maximum period of commitment is three years from the date of the court's commitment order, or the maximum term of imprisonment provided by law for the most serious offense charged in the information, indictment, or misdemeanor complaint, whichever is shorter. [Pen C §1370\(c\)\(1\)](#).

In calculating the maximum period of commitment, credit must be given for any time served in precommitment confinement attributable to the same criminal prosecution. *In re Banks* (1979) 88 CA3d 864, 152 CR 111 (precommitment confinement of defendant unable to make bail). However, if a defendant has served a period of confinement equal to the maximum time of commitment, the defendant may be subject to extended civil commitment proceedings under the [LPS Act](#) if he or she is considered dangerous to society. 88 CA3d at 871.

The three-year limit refers to the aggregate of all commitments for incompetency on the same charges, not to each commitment after a finding of incompetence. *In re Polk* (1999) 71 CA4th 1230, 1238, 84 CR2d 389.

#### **9. [§63.44] Defendant's Return to Court Before Recovery**

The committing court must order the defendant returned to the court when any of the following circumstances occurs:

- The initial 90-day progress report prepared by the medical director of the state hospital or other treatment facility, or outpatient treatment staff indicates that there is no substantial likelihood that the defendant will regain mental competence in the foreseeable future. [Pen C §1370\(b\)\(1\)](#).
- The defendant is still receiving treatment or is on outpatient status after the passage of 18 months. [Pen C §1370\(b\)\(2\)](#).

- The court determines that no treatment for the defendant’s mental impairment is being conducted. [Pen C §1370\(b\)\(3\)](#).
- The defendant fails to regain mental competence after the passage of the maximum period of commitment. [Pen C §1370\(c\)\(1\)](#); see [§63.43](#).

The court must provide a copy of its order of defendant’s return to the community program director (or designee). [Pen C §1370\(b\), \(c\)\(1\)](#).

If the defendant remains hospitalized or on outpatient status after 18 months, the court must hold another competency hearing under [Pen C §1369](#). [Pen C §1370\(b\)\(2\)](#). If the defendant is returned to the court under any of the other above conditions, the judge must determine whether to initiate conservatorship proceedings under the [LPS Act](#), dismiss the charges against the defendant and order him or her released from confinement, or dismiss the charges and initiate civil commitment proceedings. [Pen C §1370\(c\)\(2\), \(e\)](#); *In re Davis* (1973) 8 C3d 798, 804, 106 CR 178.

#### 10. [§63.45] Initiation and Effect of Conservatorship Proceedings

Whenever the defendant is returned to the committing court under [Pen C §1370\(b\)\(1\), §1370\(b\)\(2\), or §1370\(c\)\(1\)](#) (see [§63.44](#)), and it appears to the court that the defendant is “gravely disabled” as defined in [Welf & I C §5008\(h\)\(1\)\(B\)](#), the following procedures must be observed ([Pen C §1370\(c\)\(2\)](#)):

- The court must order the conservatorship investigator of the county to initiate conservatorship proceedings for the defendant under [Welf & I C §§5350–5371](#); see *People v Karriker* (2007) 149 CA4th 763, 782–783, 57 CR3d 412 (phrase “initiate conservatorship proceedings” refers not to filing the petition, but to conducting the investigation that is required before a petition may be filed under the [LPS Act](#)).
- Any hearings required in the conservatorship proceedings must be held in the superior court in the county that ordered the commitment.
- The court must provide a copy of the order directing the initiation of conservatorship proceedings to the community program director (or designee), the sheriff and the district attorney of the county in which the criminal charges are pending, and the defendant’s counsel of record.
- The court must notify the community program director (or designee), the sheriff and the district attorney of the county in

which the criminal charges are pending, and the defendant's counsel of record of the outcome of the proceedings.

If a change in placement is proposed for a defendant who is committed under [Welf & I C §5008\(h\)\(1\)\(B\)](#), the court must provide notice and an opportunity to be heard with respect to the proposed placement to the sheriff and the district attorney of the county in which criminal charges are pending. [Pen C §1370\(c\)\(3\)](#).

The initiation of conservatorship proceedings or the existence of a conservatorship does not affect any pending criminal proceedings. [Welf & I C §5352.5](#). For a sample order initiating conservatorship proceedings, see [§63.93](#).

### **11. [§63.46] Dismissal of Criminal Action**

The court may dismiss the criminal charge(s) on its own motion or on the prosecutor's application under [Pen C §1385](#). [Pen C §1370\(d\)](#). In addition, [Pen C §1370.2](#) allows the court to dismiss any misdemeanor charge(s) pending against a mentally incompetent defendant. The prosecutor must be provided ten days' notice of any motion to dismiss under [Pen C §1370.2](#). The court must provide a copy of the dismissal order to the community program director (or designee). [Pen C §§1370\(d\), 1370.2](#).

When the charges are dismissed, the defendant must be released from the commitment order, but this does not preclude the initiation of civil commitment proceedings under the [LPS Act](#). [Pen C §1370\(a\)\(6\)\(A\), \(e\)](#).

### **E. [§63.47] Commitment of Defendant Charged With Designated Felony Sex Offense**

If a defendant who has been found to be mentally incompetent is charged with a felony sex offense specified in [Pen C §290](#), the court must order that the defendant be admitted to a state hospital or other secure treatment facility (as defined in [Pen C §1370\(g\)](#)) if the following procedures are followed:

- The prosecutor determines that the defendant previously has been found mentally incompetent to stand trial on a charge of a [Pen C §290](#) offense, or that the defendant is currently the subject of a pending [Pen C §1368](#) proceeding arising out of a charge of a [Pen C §290](#) offense.
- The prosecutor notifies the court and the defendant in writing of his or her determination.
- There is an opportunity for a hearing. [Pen C §1370\(a\)\(1\)\(B\)\(ii\)](#).

In addition, any defendant who is charged with a felony sex offense specified in [Pen C §290](#), and who has been denied bail under [Cal Const art](#)

I, §12(b) because the court has found, based on clear and convincing evidence, a substantial likelihood that the defendant's release would result in great bodily harm to others, must be committed to a state hospital or other secure treatment facility. [Pen C §1370\(a\)\(1\)\(B\)\(iii\)](#).

The court may order the defendant committed to a facility other than a state hospital or secure treatment facility if it makes specific findings on the record that an alternative placement would provide more appropriate treatment for the defendant and would not pose a danger to the health and safety of others. [Pen C §1370\(a\)\(1\)\(B\)\(ii\)](#). The court must order that notice of any finding of mental incompetence arising out of a charge of a [Pen C §290](#) offense be given to the appropriate law enforcement agencies having local jurisdiction at the site of the alternative placement facility. [Pen C §1370\(a\)\(4\)](#).

If the defendant is initially committed to a state hospital or secure treatment facility and is subsequently transferred to any other facility, copies of the commitment order and other documents specified in [Pen C §1370\(a\)\(3\)](#) (see §63.39) must be taken with the defendant to each subsequent facility to which he or she is transferred. [Pen C §1370\(a\)\(6\)\(B\)](#).

#### **F. [§63.48] Commitment of Defendant Charged With Violent Felony**

A defendant charged with a violent felony, as defined in [Pen C §667.5\(c\)](#), may not be committed to a state hospital or treatment facility unless the hospital or facility has a secured perimeter or a locked and controlled treatment facility, and the court determines that the public safety will be protected. [Pen C §1370\(a\)\(1\)\(D\)–\(E\)](#).

The defendant may be placed on outpatient status, in accordance with the procedures contained in [Pen C §§1600–1620](#), if the court finds that the placement will not pose a danger to the health or safety of others. [Pen C §1370\(a\)\(1\)\(F\)](#). If the court places a defendant charged with a violent felony on outpatient status, the court must serve copies of the placement order on defense counsel, the sheriff in the county where the defendant will be placed, and the district attorney for the county in which the charges are pending. [Pen C §1370\(a\)\(1\)\(F\)](#).

#### **G. [§63.49] Outpatient Status Procedures**

A court may grant outpatient status to a defendant found to be mentally incompetent instead of committing the defendant to a state hospital or other treatment facility. [Pen C §§1370\(a\)\(1\)\(B\)\(i\), 1370.01\(a\)\(1\)](#). The procedures for granting outpatient status are detailed in [Pen C §§1600–1620](#). Those defendants not charged or convicted of



designated serious felonies under [Pen C §1601](#) may be granted outpatient status if all the following conditions are satisfied:

- In the case of a defendant who is an inpatient, the director of the state hospital or other treatment facility to which the defendant has been committed advises the court that the defendant will not be a danger to the health and safety of others while on outpatient status, and will benefit from this status. [Pen C §1602\(a\)\(1\)](#).
- In all cases, the community program director (or designee) advises the court that the defendant will not be a danger to others while on outpatient status and will benefit from this status, and recommends an appropriate supervision and treatment program. [Pen C §1602\(a\)\(2\)](#).
- After actual notice to the prosecutor and defense counsel and after a court hearing, the court specifically approves the recommendation and plan. [Pen C §1602\(a\)\(3\)](#).

The community program director (or designee) must submit the evaluation and treatment plan to the court within 15 calendar days of the court's request. [Pen C §1602\(b\)](#). However, if the defendant is an inpatient, the director has 30 calendar days to submit the evaluation. [Pen C §1602\(b\)](#). The evaluation of the community program director and the director of the treatment facility, if applicable, must include a review and consideration of complete, available information regarding the circumstances of the criminal offense and the defendant's prior criminal history. [Pen C §1602\(c\)](#).

#### **1. [§63.50] Restrictions on Release for Some Defendants**

Defendants who are charged with, or convicted of, any of the felonies designated in [Pen C §1601\(a\)](#) cannot be placed on outpatient status without first being confined to a state hospital or other treatment facility for a minimum of 180 days. [Pen C §1601\(a\)](#). The designated felonies involve acts that result in death or great bodily injury, or that pose a threat of great bodily injury to another person. [Pen C §1601\(a\)](#).

Defendants charged with or convicted of any of these felonies can be placed on outpatient status after serving the 180-day minimum confinement requirement of [Pen C §1601\(a\)](#) if all the following conditions are satisfied:

- The director of the state hospital or other treatment facility to which the defendant has been committed advises the court that the defendant would no longer be a danger to the health and safety of others, including the defendant, while under supervision and treatment in the community, and will benefit from that status. [Pen C §1603\(a\)\(1\)](#).



- The community program director advises the court that the defendant will benefit from outpatient status, and identifies an appropriate program of supervision and treatment. [Pen C §1603\(a\)\(2\)](#).
- When a request for the notice has been filed with the court and, after a court hearing, the court specifically approves the recommendation and plan for outpatient status under [Pen C §1604](#) following actual notice to the prosecutor, defense counsel, and the victim or next of kin to the victim of the defendant's offense(s). [Pen C §1603\(a\)\(3\)](#).

When the victim or the next of kin has filed a request for notice with the state hospital or other treatment facility, he or she must be notified by the director at the inception of any program in which the defendant would be allowed any type of unattended day release. [Pen C §1603\(a\)\(3\)](#).

The community program director must prepare and submit the evaluation and treatment plan to the court within 30 calendar days of the court's request. [Pen C §1603\(b\)](#). However, if the defendant is an inpatient, the director has 30 calendar days to submit the evaluation. [Pen C §1603\(b\)](#). The evaluation of the community program director and the director of the state hospital or other treatment facility must include a review and consideration of complete, available information regarding the circumstances of the criminal offense and the defendant's prior criminal history. [Pen C §1603\(c\)](#).

## **2. [§63.51] Treatment Recommendation; Hearing and Determination by Court**

After the court has received the recommendation from the director of the state hospital or other treatment facility indicating that the defendant is eligible for outpatient status, the following procedures are required under [Pen C §1604](#):

- The court must forward the recommendation to the community program director, the prosecutor, and defense counsel.
- Copies of the defendant's arrest report and state summary criminal history information must be provided to the community program director. [Pen C §1604\(a\)](#).
- Within 30 days of receiving the recommendation, the community program director (or designee) must prepare and submit his or her own recommendation regarding the defendant's eligibility for outpatient treatment to the court and, if appropriate, to the director of the state hospital or other treatment facility. [Pen C §1604\(b\)](#). This recommendation must include a plan for outpatient

supervision and treatment, including specific terms and conditions to be followed by the defendant. [Pen C §1604\(b\)](#).

- The court must forward copies of the community program director's recommendation and treatment plan to the prosecutor and defense counsel. [Pen C §1604\(b\)](#).

The court must hold a noticed hearing within 15 judicial days of the receipt of the community program director's report to determine whether to approve or disapprove the recommendation for outpatient status. [Pen C §1604\(c\)–\(d\)](#). The court must consider the circumstances and nature of the offense that led to the defendant's commitment and his or her prior criminal history. [Pen C §1604\(c\)](#). On the court's approval, the defendant must be placed on outpatient status for no more than one year and subject to the terms and conditions in the recommendation and treatment plan. [Pen C §§1604\(d\), 1606](#).

### 3. [§63.52] Progress Reports; Annual Review

The community program director (or designee) is responsible for supervising the defendant. [Pen C §1605\(c\)](#). It is also his or her responsibility to submit reports setting forth the defendant's status and progress to the court, the prosecutor, and defense counsel every 90 days. [Pen C §1605\(d\)](#).

At the end of the period of outpatient status approved by the court (no longer than one year), the court must hold a noticed hearing to determine whether to discharge the defendant from outpatient treatment, order the defendant confined to a treatment facility, or renew the defendant's outpatient status. [Pen C §1606](#). Before the hearing, the community program director must provide a report and recommendation to the medical director of the state hospital, if appropriate, and to the court. The court must make the report available to the prosecutor and defense counsel. [Pen C §1606](#).

### 4. [§63.53] Restoration of Mental Competence

If at any time during the outpatient period the outpatient supervisor is of the opinion that the defendant has regained competence to stand trial, he or she must forward this opinion to the community program director. [Pen C §1374](#). The community program director must submit the opinion to the medical director of the state hospital, if appropriate, and to the court. [Pen C §1607](#). The court must then calendar the case for further proceedings under [Pen C §1372](#). [Pen C §1607](#). Time spent on outpatient status must be credited against the defendant's sentence. [Pen C §1375.5](#). For discussion, see [§63.76](#).

## 5. [§63.54] Revocation of Outpatient Status

If the outpatient supervisor believes that the defendant requires extended inpatient treatment or refuses to accept further outpatient treatment and supervision, the community program director must file a written request for revocation with the superior court either in the county that approved the outpatient status or in the county where outpatient treatment is being provided. [Pen C §1608](#). The community program director must provide copies of the request to defense counsel and the prosecutor in both counties if the request is made in the county of treatment rather than the county of commitment. [Pen C §1608](#).

The court must hold a hearing within 15 judicial days of the filing of the request and either approve or disapprove the request. [Pen C §1608](#). Outpatient status may be revoked if community program representatives establish by a preponderance of the evidence that the defendant is not manageable in the outpatient treatment program or that the defendant needs extended inpatient treatment. *People v DeGuzman* (1995) 33 CA4th 414, 420, 39 CR2d 1137. See also *In re McPherson* (1985) 176 CA3d 332, 222 CR 416 (procedural standards of probation revocation hearing generally applicable to outpatient revocation hearing). The court may consider whether the defendant presents a danger to public safety if allowed to continue outpatient treatment in determining whether to revoke the treatment. *People v DeGuzman, supra*, 33 CA4th at 421. If the court revokes the outpatient treatment, it must order the defendant confined in a state hospital or other treatment facility approved by the community program director. [Pen C §1608](#).

The defendant may be confined in a state hospital, other treatment facility, or county jail, pending the court's decision on revocation if it is the community program director's opinion that the defendant is a danger to himself or herself or to other persons and that to delay confinement until the hearing would pose an imminent risk of harm to the defendant or other persons. [Pen C §1610](#).

## H. [§63.55] Incompetency Procedures in Misdemeanor Cases

BULLETIN: The Second District Court of Appeal has declared that [Pen C §1367.1](#) is unconstitutional, holding that the statute deprives misdemeanor defendants of equal protection. The court found no compelling state interest in requiring a misdemeanor defendant, believed to be incompetent because of a mental disorder, to submit to involuntary evaluation and treatment under the Lanterman-Petris-Short Act instead of or prior to a competency determination. *Pederson v Superior Court* (2003) 105 CA4th 931, 939–942, 130 CR2d 289. The court directs all trial courts to handle misdemeanor cases according to [Pen C §1368](#), in the same manner as felony cases (see checklist in [§63.2](#), and [§§63.6–63.27](#)). 105

CA4th at 943. CJER has chosen to retain the checklist in §63.3 and §§63.55–63.71, addressing procedures under Pen C §1367.1, pending further case law developments and/or legislative revision of the codes.

When a defendant is charged with a misdemeanor or misdemeanors only, and the judge finds reason to believe that the defendant is mentally disordered, and may, as a result of the mental disorder, be incompetent to stand trial, the determination of competence is governed by Pen C §§1367.1 and 1370.01. Pen C §1367(b). The procedure for handling defendants charged with a felony is governed by Pen C §1370. See discussion in §§63.6–63.54.

### 1. [§63.56] Judge’s Preliminary Conclusion of Incompetence

If, at any time during the criminal proceedings and before judgment in a case, the defendant’s behavior or other evidence leads the judge to conclude that there is reason to believe that the defendant is mentally disordered and, as a result, may be incompetent to stand trial, the judge must state this conclusion and his or her reasons in the record. Pen C §1367.1(a).

### 2. [§63.57] Counsel’s Opinion of Incompetence

If the judge concludes that the defendant may be incompetent to stand trial, he or she must ask defense counsel whether it is counsel’s opinion that the defendant is mentally disordered. Pen C §1367.1(a). If the defendant is not represented, the judge must appoint counsel. Pen C §1367.1(a). On the request of the defendant or defense counsel, or on its own motion, the judge must recess the criminal proceedings for as long as may be reasonably necessary to permit defense counsel to speak with the defendant and to form an opinion as to whether the defendant is mentally disordered. Pen C §1367.1(a).

### 3. [§63.58] Referral for Evaluation and Treatment

When defense counsel informs the judge that he or she believes the defendant is or may be mentally disordered, the court must order that the defendant be referred for a 72-hour evaluation and treatment under Pen C §4011.6. Pen C §1367.1(b). If defense counsel does not believe that the defendant is mentally disordered, the judge may nevertheless order a Pen C §4011.6 evaluation and treatment. Pen C §1367.1(b). The judge may order the mental health facility conducting the evaluation and treatment to provide the court with a copy of the discharge summary at the conclusion of the evaluation and treatment. Pen C §1367.1(b). For discussion of Pen C §4011.6 evaluation procedures, see §§63.78–63.84.

- ☛ **JUDICIAL TIP:** Penal Code §1367.1(b) states that the court must order a 72-hour evaluation and treatment if defense counsel believes that the defendant is mentally disordered. Presumably, as in felony cases, the court is required to order a referral only when there is objective, substantial evidence of a mental disorder.

When an order for evaluation and treatment has been made, the court must suspend all criminal proceedings until the evaluation and treatment has concluded. Pen C §1367.1(c). However, defense counsel may demur, move to dismiss the case on the ground that there is not reasonable cause to believe that a public offense has been committed and that the defendant is guilty of it, or make a Pen C §1538.5 suppression motion. Pen C §1368.1(b). In ruling on a demurrer or on these motions, the court may hear any matter that is capable of fair determination without the defendant's personal participation. Pen C §1368.1(c).

If a jury has been impaneled and sworn to try the case, the judge may discharge the jury if he or she concludes that undue hardship to the jurors would result if they are retained on call. Pen C §1367.1(c).

#### 4. [§63.59] Defendant's Return to Court

When the 72-hour evaluation and treatment has concluded, the defendant must be returned to court. Pen C §1367.1(d). If it appears to the judge that the defendant is competent to stand trial, the criminal proceedings must resume, the trial on the offense(s) must proceed, and judgment may be pronounced. Pen C §1367.1(d). If the judge has reason to believe that the defendant may be incompetent to stand trial despite the treatment, the judge may certify the defendant to court for a competency hearing held under Pen C §§1368.1 and 1369. Pen C §1367.1(d). For a comprehensive discussion of this hearing, see §§63.28–63.34.

#### 5. Commitment to Treatment Facility or Outpatient Status Placement

##### a. [§63.60] Evaluation by Mental Health Director

If the defendant is found mentally incompetent, the court must order that the defendant be admitted to a private or public treatment facility or placed on outpatient status. Pen C §1370.01(a)(1). However, before making its commitment order, the court must order the county mental health director (or designee) to evaluate the defendant and submit to the court within 15 judicial days of the order a written recommendation of whether the defendant should undergo outpatient treatment or be committed to a treatment facility. Pen C §1370.01(a)(2)(A).

A defendant may not undergo either form of treatment without first being evaluated by the county mental health director (or designee). Pen C

§1370.01(a)(2)(A). In addition, a defendant may not be admitted to a state hospital unless the county mental health director finds that there is no less restrictive appropriate placement available, and the county mental health director has a contract with the State Department of Mental Health for these placements. Pen C §1370.01(a)(2)(A).

## **b. Administration of Antipsychotic Medication**

### **(1) [§63.61] Voluntary Treatment**

The court must hear and determine whether the defendant, with advice of his or her counsel, consents to the administration of antipsychotic medication. If the defendant, with advice of his or her counsel, consents, the court order of commitment must include confirmation that antipsychotic medication may be given to the defendant as prescribed by a treating psychiatrist pursuant to the defendant's consent. Pen C §1370.01(a)(2)(B)(i).

The commitment order must also indicate that if the defendant withdraws consent for antipsychotic medication, after the treating psychiatrist complies with the provisions under Pen C §1370.01(a)(2)(C), the defendant must be returned to court for a hearing in accordance with Pen C §1370.01(a)(2)(B)(ii) regarding whether antipsychotic medication shall be administered involuntarily. Pen C §1370.01(a)(2)(B)(i). See §63.62.

### **(2) [§63.62] Involuntary Treatment**

If the defendant does not consent to the administration of antipsychotic medication, the court must hear and determine whether any of the following is true (Pen C §1370.01(a)(2)(B)(ii)):

- The defendant lacks capacity to make decisions regarding antipsychotic medication, the defendant's mental disorder requires medical treatment with antipsychotic medication, and if the defendant's mental disorder is not treated with antipsychotic medication, it is probable that serious harm to the physical or mental health of the patient will result. Probability of serious harm to the physical or mental health of the defendant requires evidence that the defendant is presently suffering adverse effects to his or her physical or mental health, or the defendant has previously suffered these effects as a result of a mental disorder, and his or her condition is substantially deteriorating. The fact that a defendant has a diagnosis of a mental disorder does not alone establish probability of serious harm to the physical or mental health of the defendant. Pen C §1370.01(a)(2)(B)(ii)(I).

- The defendant is a danger to others, in that the defendant has inflicted, attempted to inflict, or made a serious threat to inflict substantial physical harm on another while in custody, or the defendant had inflicted, attempted to inflict, or made a serious threat to inflict substantial physical harm on another that resulted in his or her being taken into custody, and the defendant presents, as a result of mental disorder or mental defect, a demonstrated danger of inflicting substantial physical harm on others. Demonstrated danger may be based on an assessment of the defendant's present mental condition, including a consideration of past behavior of the defendant within six years before the time the defendant last attempted to inflict, inflicted, or threatened to inflict substantial physical harm on another, and other relevant evidence. [Pen C §1370.01\(a\)\(2\)\(B\)\(ii\)\(II\)](#).
- The defendant has been charged with a serious crime; involuntary administration of antipsychotic medication is substantially likely to render the defendant competent to stand trial; the medication is unlikely to have side effects that interfere with the defendant's ability to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a reasonable manner; less intrusive treatments are unlikely to have substantially the same results; and antipsychotic medication is in the patient's best medical interest in light of his or her medical condition. [Pen C §1370.01\(a\)\(2\)\(B\)\(ii\)\(III\)](#).

*Note:* [Penal Code §1370.01\(a\)\(2\)\(B\)\(ii\)\(III\)](#) complies with the holding in [Sell v U.S.](#) (2003) 539 US 166, 123 S Ct 2174, 156 L Ed 2d 197. See [People v O'Dell](#) (2005) 126 CA4th 562, 569–572, 23 CR3d 902.

If the court finds any of the conditions described in [Pen C §1370.01\(a\)\(2\)\(B\)\(ii\)](#) to be true, the court must issue an order authorizing the treatment facility to involuntarily administer antipsychotic medication to the defendant when and as prescribed by the defendant's treating psychiatrist. However, the court may order involuntary administration of antipsychotic medication under the conditions described in [Pen C §1370.01\(a\)\(2\)\(B\)\(ii\)\(III\)](#) only if the defendant does not lack capacity to make decisions regarding antipsychotic medication and is not a danger to others, within the meaning of [Pen C §1370.01\(a\)\(2\)\(B\)\(ii\)\(I\)](#) and (II). [Pen C §1370.01\(a\)\(2\)\(B\)\(iii\)](#); *People v O'Dell*, *supra*, 126 CA4th at 570 n3.

In all cases, the treating hospital, facility, or program may administer medically appropriate antipsychotic medication prescribed by a psychiatrist in an emergency as defined in [Welf & I C §5008\(m\)](#). [Pen C §1370.01\(a\)\(2\)\(B\)\(iv\)](#).



If the defendant consented to antipsychotic medication as described in [Pen C §1370.01\(a\)\(2\)\(B\)\(i\)](#), but subsequently withdraws his or her consent, *or* if involuntary antipsychotic medication was not ordered under [Pen C §1370.01\(a\)\(2\)\(B\)\(ii\)](#), and the treating psychiatrist determines that antipsychotic medication has become medically necessary and appropriate, the treating psychiatrist must make efforts to obtain informed consent from the defendant for antipsychotic medication. [Pen C §1370.01\(a\)\(2\)\(C\)](#). If informed consent is not obtained from the defendant, and the treating psychiatrist is of the opinion that the defendant lacks capacity to make decisions regarding antipsychotic medication as described in [Pen C §1370.01\(a\)\(2\)\(B\)\(ii\)\(I\)](#), *or* that the defendant is a danger to others as described in [Pen C §1370.01\(a\)\(2\)\(B\)\(ii\)\(II\)](#), the committing court must be provided notice and an assessment of the current mental status of the defendant and the opinion of the treating psychiatrist that involuntary antipsychotic medication has become medically necessary and appropriate. [Pen C §1370.01\(a\)\(2\)\(C\)](#). The court must provide notice to the prosecutor and to defense counsel and must set a hearing to determine whether involuntary antipsychotic medication should be ordered in the manner described in [Pen C §1370.01\(a\)\(2\)\(B\)](#). [Pen C §1370.01\(a\)\(2\)\(C\)](#).

**c. [§63.63] Commitment Order**

After the court has reviewed the placement recommendation of the county mental health director (or designee), the court must order that ([Pen C §1370.01\(a\)\(1\)](#)):

- The defendant be delivered by the sheriff to an available public or private treatment facility approved by the county mental health director that will promote the defendant's restoration to mental competence, *or* placed on outpatient status; *and*
- On the filing of a certificate of restoration of competence, the defendant be returned to court under [Pen C §1372](#).

The court must provide a copy of its order to the county mental health director (or designee). [Pen C §1370.01\(a\)\(1\)](#).

The commitment order exonerates any bail bond, undertaking, or deposit on file by or on behalf of the defendant. [Pen C §1371](#).

**d. [§63.64] Documentation To Accompany Defendant**

When the court orders that the defendant be confined to a treatment facility under [Pen C §1370.01\(a\)\(3\)](#), the court must provide copies of the following documents, which must be taken with the defendant to the treatment facility:

- The commitment order, including a specification of the charges.

- A computation or statement indicating the maximum term of commitment in accordance with [Pen C §1370.01\(c\)](#) (see §63.68).
- A computation or statement indicating any amount of credit for time served to be deducted from the maximum term of commitment.
- State’s summary criminal history information.
- Any arrest reports prepared by the police department or other law enforcement agency.
- Any court-ordered psychiatric examination or evaluation reports.
- The county mental health director’s placement recommendation report.

**e. [§63.65] Transfer of Defendant to Another Facility**

The court may, on receiving a written recommendation by the county mental health director, transfer the defendant to another approved treatment facility. [Pen C §1370.01\(a\)\(5\)](#). The court must notify the defendant, defense counsel, the prosecuting attorney, and the county mental health director (or designee) before making a transfer order. [Pen C §1370.01\(a\)\(5\)](#).

The prosecutor or the defendant may contest the transfer order by filing a petition with the court for a hearing, which must be held if the court determines that sufficient grounds exist. [Pen C §1370.01\(a\)\(5\)](#). At the hearing, the prosecutor or the defendant may present evidence bearing on the transfer order. The court must employ the same standards that are used in conducting probation revocation hearings under [Pen C §1203.2](#). [Pen C §1370.01\(a\)\(5\)](#). For a discussion of probation revocation hearings, see California Judges Benchguide 84: *Probation Revocation* (Cal CJER).

**6. [§63.66] Outpatient Status Placement**

A defendant may be placed on outpatient status under the supervision of the county mental health director (or designee) by order of the court in accordance with the procedures contained in [Pen C §§1600–1620](#). [Pen C §1370.01\(a\)\(4\)](#). For discussion of these procedures, see §§63.49–63.54. (Note: Where the term “community program director” appears in [Pen C §§1600–1620](#), the term “county mental health director” must be substituted.)

**7. [§63.67] Progress Reports**

The medical director of the treatment facility must provide to the court and the county mental health director (or designee) a written report addressing the defendant’s progress toward recovery of mental

competence within 90 days of the commitment order. [Pen C §1370.01\(b\)](#). If the defendant is on outpatient status, the outpatient treatment staff must provide a written progress report to the county mental health director, and the director must report to the court within the 90-day period. [Pen C §1370.01\(b\)](#).

The report must include a description of any antipsychotic medication administered to the defendant and its effects and side effects, including effects on the defendant's appearance or behavior that would affect the defendant's ability to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a reasonable manner. [Pen C §1370.01\(a\)\(2\)\(B\)\(v\)](#).

If the defendant has not recovered mental competence, but the report indicates a substantial likelihood that the defendant will regain mental competence in the foreseeable future, the defendant must remain in the treatment facility or on outpatient status. [Pen C §1370.01\(b\)](#).

Subsequent written progress reports (following the above procedure) must be provided at six-month intervals or until the defendant becomes mentally competent. [Pen C §1370.01\(b\)](#). The court must supply copies of the progress reports to the prosecutor and defense counsel. [Pen C §1370.01\(b\)](#).

#### **8. [§63.68] Duration of Commitment; Credit for Precommitment Confinement**

In misdemeanor cases, the maximum period of commitment is one year from the date of the court's commitment order, or the maximum term of imprisonment provided by law for the most serious offense charged, whichever is shorter. [Pen C §1370.01\(c\)\(1\)](#).

In calculating the maximum period of commitment, credit must be given for any time served in precommitment confinement attributable to the same criminal prosecution. *In re Banks* (1979) 88 CA3d 864, 152 CR 111 (precommitment confinement of defendant unable to make bail). However, if a defendant has served a period of confinement equal to the maximum time of commitment, he or she may be subject to extended civil commitment proceedings under the [LPS Act](#) if considered dangerous to society. 88 CA3d at 871.

#### **9. [§63.69] Defendant's Return to Court Before Recovery**

The committing court must order the defendant returned to the court under either of the following circumstances:

- The initial 90-day progress report prepared by the county mental health director or outpatient treatment staff indicates that there is no substantial likelihood that the defendant will regain mental competence in the foreseeable future. [Pen C §1370.01\(b\)](#).

- The defendant fails to regain mental competence after the passage of the maximum period of confinement. [Pen C §1370.01\(c\)\(1\)](#); see [§63.68](#).

The court must provide a copy of its order of the defendant's return to the county mental health director (or designee). [Pen C §1370.01\(b\)–\(c\)\(1\)](#).

If the defendant is returned to the court, the judge must determine whether to initiate conservatorship proceedings under the [LPS Act](#), dismiss the charges against the defendant and order him or her released from confinement, or dismiss the charges and initiate civil commitment proceedings. [Pen C §1370.01\(c\)\(2\), \(d\)–\(e\)](#); *In re Davis* (1973) 8 C3d 798, 804, 106 CR 178.

#### **10. [§63.70] Initiation and Effect of Conservatorship Proceedings**

Whenever the defendant is returned to the committing court under [Pen C §1370.01\(b\)](#) or [§1370.01\(c\)\(1\)](#) (see [§63.69](#)), and it appears to the court that the defendant is “gravely disabled” as defined in [Welf & I C §5008\(h\)\(1\)\(A\)](#), the court must order the conservatorship investigator of the county to initiate conservatorship proceedings for the defendant under [Welf & I C §§5350–5371](#). [Pen C §1370.01\(c\)\(2\)](#). Any hearings required in the conservatorship proceedings must be held in the superior court in the county that ordered the commitment. [Pen C §1370.01\(c\)\(2\)](#). The court must provide a copy of the order directing the initiation of conservatorship proceedings to the county mental health director (or designee) and must notify the director (or designee) of the outcome of the proceedings. [Pen C §1370.01\(c\)\(2\)](#). The initiation of conservatorship proceedings or the existence of a conservatorship does not affect any pending criminal proceedings. [Welf & I C §5352.5](#).

#### **11. [§63.71] Dismissal of Criminal Action**

The court may dismiss the criminal charge(s) on its own motion or on the application of the prosecutor under [Pen C §1385](#). [Pen C §1370.01\(d\)](#). In addition, [Pen C §1370.2](#) allows the court to dismiss any misdemeanor charge(s) pending against a mentally incompetent defendant. The prosecutor must be provided ten days' notice of any motion to dismiss under [Pen C §1370.2](#). The court must provide a copy of the dismissal order to the county mental health director (or designee). [Pen C §§1370.01\(d\), 1370.2](#).

When the charges are dismissed, the defendant must be released from the commitment order, but this does not preclude the initiation of civil commitment proceedings under the [LPS Act](#). [Pen C §1370.01\(a\)\(5\), \(e\)](#).

## I. [§63.72] Commitment of Developmentally Disabled Defendants

The procedures for determining the competence of a defendant who is developmentally disabled, as defined in [Pen C §1370.1\(a\)\(1\)\(H\)](#), generally parallel those that govern the competency determination of nondevelopmentally disabled defendants. The commitment procedures in cases involving developmentally disabled defendants are outlined in [Pen C §1370.1](#). Some distinctions in cases involving developmentally disabled defendants include:

- The director of the regional center for the developmentally disabled (or designee) conducts the evaluation of the defendant and makes the recommendation for the type of commitment appropriate for the defendant, *i.e.* state hospital, developmental center, other residential facility, or placement on outpatient status. [Pen C §1370.1\(a\)\(2\)](#).
- The executive director (or designee) of the facility to which the defendant is committed must submit a progress report to the court within 90 days and another within 150 days of the commitment order. [Pen C §1370.1\(b\)\(1\)](#).
- Developmentally disabled defendants who are dangerous to themselves or others may be committed to the State Department of Developmental Services under [Welf & I C §§6500–6513](#). [Pen C §1370.1\(c\)\(2\)](#).
- The court may, on recommendation of the regional center director, dismiss the charges against the defendant if the director concludes that the defendant's behavior related to the charged offense has been eliminated during time spent in court-ordered programs. [Pen C §1370.1\(d\)](#).

Diversion under [Pen C §§1001.20–1001.34](#) is an alternative to dismissal when the defendant is developmentally disabled and the offense is charged as, or reduced to, a misdemeanor. [Pen C §1001.21](#). A defendant may not be diverted if he or she has been diverted within the previous two years. [Pen C §1001.21\(b\)](#). Furthermore, the court must consult the prosecutor, defense counsel, probation department, and the appropriate regional center for the developmentally disabled to determine whether a defendant may be diverted. [Pen C §1001.22](#). The criminal charges must be dismissed on satisfactory completion of the diversion program. [Pen C §1001.31](#). For a comprehensive discussion of diversion of developmentally disabled defendants, see California Judges Benchguide 62: *Deferred Entry of Judgment/Diversion* (Cal CJER).

## J. [§63.73] Restoration of Mental Competence

If the appropriate directing supervisor of any commitment facility or outpatient program determines that the defendant has regained mental competence, he or she must immediately certify that fact to the court by filing a certificate of restoration with the court by certified mail, return receipt requested. [Pen C §§1372\(a\)\(1\), 1374, 1607](#). If a conservatorship has been established under the [LPS Act](#) or [Pen C §1370](#), the conservator must certify the fact of the defendant's restored competence to the sheriff and the district attorney of the county in which the defendant's case is pending, to the defendant's attorney of record, and to the court. [Pen C §1372\(b\)](#).

The sheriff must return the defendant to the committing court within ten days of the filing of the certificate of restoration. [Pen C §1372\(a\)\(2\)](#). On the defendant's return to the court with a certificate of competence, the court must notify the appropriate treatment services director of the date of any hearing on the issue of defendant's competence and the court's finding of the restoration of competence. [Pen C §1372\(c\)](#). If the court finds that the defendant has regained mental competence, the criminal proceedings must be promptly resumed at the stage at which they were suspended. [Pen C §§1370\(a\)\(1\)\(A\), 1370.01\(a\)\(1\)](#); *People v Simpson* (1973) 30 CA3d 177, 106 CR 254 (unnecessary delay in resumption of proceedings may abridge speedy trial right).

### 1. [§63.74] Restoration Hearing

Although [Pen C §1372](#) does not directly provide for a hearing in which the defendant may challenge the certification of competence, the numerous references in [Pen C §1372](#) to a hearing indicate a legislative intent that such a hearing may be afforded. *People v Murrell* (1987) 196 CA3d 822, 826, 242 CR 175. However, absent a defendant's request for a hearing, the court may summarily approve the certification. *People v Mixon* (1990) 225 CA3d 1471, 1480, 275 CR 817 ([Pen C §1372\(c\)](#) and (d) imply approval authority without a hearing). The defendant is presumed competent at the hearing. *People v Rells* (2000) 22 C4th 860, 867, 94 CR2d 875. Once the defendant requests a hearing to challenge the certification, the defendant has the burden of proving by a preponderance of the evidence that he or she has not regained competence. 22 C4th at 868. However, the prosecution may present evidence that the defendant has not regained competence if the defense declines to do so. In this case, the burden of proof falls on the prosecution. 22 C4th at 868 (burden falls on party who challenges presumption).

The defendant does not have a right to a jury at the competency restoration hearing. *People v Murrell*, *supra*, 196 CA3d at 826. However,

the defendant must be represented by counsel. *People v Mixon, supra*, 225 CA3d at 1485.

## 2. [§63.75] Bail or Own-Recognizance Release

If the court approves the certification of restoration of competence for an in-custody defendant, the court must hold a hearing to decide whether the defendant is entitled to bail or an own-recognizance (OR) release pending the conclusion of the criminal proceedings. [Pen C §1372\(d\)](#). A defendant who was placed on outpatient status must remain released on OR or, in the case of a developmentally disabled defendant, either on the defendant's promise or on the promise of a responsible adult who would ensure the defendant's future court appearances. [Pen C §1372\(d\)](#). When the defendant has refused to come to court, the court must set bail and place the defendant in custody until bail is posted. [Pen C §1372\(d\)](#).

As an alternative to admission to bail or OR release, the court may, on the recommendation of the director of the facility where the defendant is receiving treatment, order the defendant's return to the same or another facility for continued treatment. [Pen C §1372\(e\)](#). The recommendation must be based on the opinion that continued treatment is necessary to maintain the defendant's mental competence or that placing the defendant in a jail would create a substantial risk that the defendant would again become incompetent to stand trial before the criminal proceedings could be resumed. [Pen C §1372\(e\)](#).

## 3. [§63.76] Commitment Time Credit

Time spent by a defendant in a hospital or other facility, or as an outpatient under [Pen C §1600](#), as a result of a commitment for mental incompetence must be credited to the term of any imprisonment for which the defendant is sentenced in the criminal case that was suspended under [Pen C §1370](#), [§1370.01](#), or [§1370.1](#). [Pen C §1375.5](#).

If the defendant is charged with a misdemeanor, time spent in the facility or on outpatient status may consume the entire potential sentence. The defendant would then be entitled to dismissal of the criminal charge and released from the facility or outpatient program unless he or she is subject to [LPS Act](#) proceedings. See [Pen C §§1370\(c\), \(e\), 1370.01\(c\), \(e\), 1370.1\(c\)](#).

Committed defendants cannot earn [Pen C §4019](#) conduct and participation credits against a subsequent imprisonment term. *People v Waterman* (1986) 42 C3d 565, 229 CR 796. But see *People v Bryant* (2009) 174 CA4th 175, 182–184, 94 CR3d 151 (committed defendant entitled to conduct credits at sentencing for time spent in the hospital, after its staff had notified the trial court that he had become competent;



defendant had an equal protection right to credits he would have earned in the county jail had he obtained a timely trial competency determination).

#### 4. [§63.77] Calculating Statutory Time Limitations When Criminal Proceedings Reinstated

When a defendant regains competence and the criminal proceedings are reinstated, the court should calculate the days remaining in which to commence trial. In felony cases, the 60-day period to bring a defendant to trial begins to run when the defendant is arraigned on an indictment or information. [Pen C §§1049.5, 1382\(a\)\(2\)](#). However, if the proceedings are suspended under [Pen C §1368](#) after the arraignment, the 60-day period restarts when the proceedings are reinstated. [Pen C §1382\(a\)\(2\)](#); [Cal Rules of Ct 4.130\(c\)\(3\)\(B\)](#).

Under [Pen C §859b](#), preliminary hearings must generally be held within ten court days of the defendant's arraignment or plea, whichever occurs later. However, if criminal proceedings are suspended, the ten-day period commences when the proceedings are reinstated. [Pen C §859b](#); [Cal Rules of Ct 4.130\(c\)\(3\)\(A\)](#).

In misdemeanor cases, the 30-day or 45-day period to bring a defendant to trial begins to run when the defendant is arraigned or enters a plea, whichever occurs later. [Pen C §1382\(a\)\(3\)](#). However, if the criminal proceedings are suspended under [Pen C §1367.1](#), the defendant must be brought to trial within 30 days after the proceedings are reinstated. [Pen C §1382\(a\)\(3\)](#); [Cal Rules of Ct 4.130\(c\)\(2\)](#).

### K. Referral for Mental Health Evaluation Under [Pen C §4011.6](#)

#### 1. [§63.78] Procedure for Court Referral of Defendant

When a defendant is charged with misdemeanors only, and the judge finds reason to believe that the defendant is mentally incompetent to stand trial, the court must order the defendant to be taken to a designated health care facility for 72-hour treatment and evaluation under [Welf & I C §5150](#). [Pen C §§1367.1\(b\), 4011.6](#) (first paragraph) (but see Bulletin in [§63.3](#)). In all other cases involving in-custody defendants in which it appears to the judge that the defendant may be mentally disordered, the judge may order a 72-hour treatment and evaluation. [Pen C §4011.6](#) (first paragraph). The judge must inform the facility in a confidential writing of the reasons why the person is being taken to the facility. The local mental health director (or designee) may examine the defendant before transfer to the 72-hour facility. [Pen C §4011.6](#) (first paragraph). The court must also “forthwith” notify the local mental health director (or designee), the prosecuting attorney, and defense counsel in the criminal proceedings about that transfer. [Pen C §4011.6](#) (second paragraph). For sample referral form, see [§63.91](#).

## 2. [§63.79] Mental Health Report

The mental health facility must transmit a confidential report to the judge who made the referral and to the local mental health director (or designee) concerning the condition of the defendant. [Pen C §4011.6](#) (third paragraph). A new report must be transmitted at the end of each period of confinement provided for in the applicable Welfare and Institutions Code provisions. A new report is also required on conversion of the defendant to voluntary status (see [§63.81](#)) and on the filing of temporary letters of conservatorship. [Pen C §4011.6](#) (third paragraph).

## 3. [§63.80] Applicable Welfare and Institutions Code Provisions

[Penal Code §4011.6](#) (first paragraph) refers to selected provisions of the [LPS Act](#) that govern the disposition of a defendant who comes into the civil commitment system as the result of the court's referral. The length of the commitment, and thus the defendant's availability to return to court, will depend on the defendant's mental condition, as evaluated at intervals specified by the [LPS Act](#). The applicable provisions of [Part 1, Division 5 of the Welfare and Institutions Code](#) are as follows (see also [Welf & I C §5008](#) (definitions)):

Welf & I C Chapter/Article	Welf & I C Sections	Proceedings Governed by Provisions
<a href="#">Ch 2, Art 1</a>	<a href="#">5150–5157</a>	Detention of mentally disordered persons for evaluation and treatment
<a href="#">Ch 2, Art 4</a>	<a href="#">5250–5259.3</a>	Certification of detained persons for intensive treatment
<a href="#">Ch 2, Art 4.5</a>	<a href="#">5260–5268</a>	Additional intensive treatment of suicidal persons
<a href="#">Ch 2, Art 5</a>	<a href="#">5275–5278</a>	Right to judicial review when person is detained for intensive treatment
<a href="#">Ch 2, Art 6</a>	<a href="#">5300–5309</a>	Postcertification procedures for imminently dangerous persons
<a href="#">Ch 2, Art 7</a>	<a href="#">5325–5337</a>	Legal and civil rights of persons involuntarily detained
<a href="#">Ch 3</a>	<a href="#">5350–5371</a>	Conservatorship for gravely disabled persons

#### 4. [§63.81] Conversion to Voluntary Inpatient Status

A defendant who has been transferred to an inpatient facility under [Pen C §4011.6](#) may convert to voluntary inpatient status without obtaining the consent of the court, the person in charge of the jail, or the local mental health director. At the beginning of that conversion, the person in charge of the facility must transmit a report to the judge, counsel for the defendant, prosecuting attorney, and local mental health director (or designee). [Pen C §4011.6](#) (fourth paragraph).

#### 5. [§63.82] Effect of Referral on Statutory Time Limitations

During the defendant's detention in a mental health facility under the [LPS Act](#) provisions based on a [Pen C §4011.6](#) referral, time continues to run for arraignment or trial unless (1) the defendant has waived time, (2) the person in charge of the facility determines under [Pen C §4011.6](#) that arraignment or trial would be detrimental to the defendant's well-being, or (3) good cause to the contrary is shown under [Pen C §1382](#). [Pen C §§1382, 4011.6](#) (seventh paragraph); *People v Vass* (1987) 196 CA3d Supp 13, 18, 242 CR 330. The defendant's danger to himself or herself or to others, or grave disability, are not by themselves sufficient reasons to delay arraignment or trial. 196 CA3d Supp at 17.

#### 6. [§63.83] Effect of Detention on Sentence

If the defendant is detained in, or remanded to, a facility under the [LPS Act](#) provisions, the time passed in the facility must be counted as part of the defendant's sentence. [Pen C §4011.6](#) (fifth paragraph). When the defendant is detained or remanded, the person in charge of the jail must advise the professional person in charge of the facility of the expiration date of the defendant's sentence. If the defendant is to be released from the facility before the expiration date, the professional person in charge must notify the local mental health director (or designee), counsel for the defendant, the prosecuting attorney, and the person in charge of the jail, who must send for, take, and receive the defendant back into the jail. [Pen C §4011.6](#) (fifth paragraph).

#### 7. [§63.84] Initiation of Conservatorship Proceedings

Conservatorship proceedings may be initiated for any gravely disabled defendant transferred to a facility under [Pen C §4011.6](#) on recommendation of the appropriate facility director to the county conservatorship investigator for the defendant's county of residence or for the county in which the facility is located. The initiation of conservatorship proceedings or the existence of a conservatorship does not affect any pending criminal proceedings. [Welf & I C §§5008\(h\)](#) (defining

grave disability), 5352.5. For sample order initiating conservatorship proceedings, see §63.93.

#### **L. [§63.85] Mental Retardation Hearing in Death Penalty Cases**

A capital case defendant has the right to a determination of whether he or she is mentally retarded. *Pen C §1376(b)(1)*; see *Atkins v Virginia* (2002) 536 US 304, 122 S Ct 2242, 153 L Ed 2d 335 (prohibiting execution of mentally retarded persons).

*Penal Code C §1376* provides for mental retardation hearings in cases in which the prosecution is seeking the death penalty. In such cases, the defendant may, at a reasonable time before the commencement of trial, apply for an order directing that a mental retardation hearing be conducted. *Pen C §1376(b)(1)*. When a declaration is submitted by a qualified expert stating his or her opinion that the defendant is mentally retarded, the court must order a hearing to determine whether the defendant is mentally retarded. *Pen C §1376(b)(1)*.

At the request of the defendant, the court must conduct the hearing without a jury before the commencement of the trial. The defendant's request for a court hearing before trial constitutes a waiver of a jury hearing on the issue of mental retardation. *Pen C §1376(b)(1)*. If the defendant does not request a court hearing, the court must order a jury hearing. The jury hearing on mental retardation must occur at the conclusion of the phase of the trial in which the jury has found the defendant guilty with a finding that one or more of the special circumstances enumerated in *Pen C §190.2* are true. *Pen C §1376(b)(1)*.

For a comprehensive discussion of *Pen C §1376*, see California Judges Benchguide 98: *Death Penalty Benchguide: Pretrial and Guilt Phase*, §§98.20–98.29 (Cal CJER).

### **IV. SAMPLE FORMS**

#### **A. [§63.86] Script: Judge Expresses Doubt About Defendant's Present Mental Competence Under Pen C §1368; Defense Counsel Agrees**

(1) Describe the reason(s) for doubting the defendant's mental competence and state that doubt on the record.

In People versus \_\_\_\_\_, I have observed the conduct of [Mr./Ms.] [name of defendant] in the courtroom. [Mr./Ms.] [name of defendant] has [describe conduct].

This conduct [and [describe additional reasons for doubting defendant's competence, e.g., defendant's responses to questions asked by the court]] [has/have] caused a doubt to arise in the mind of the court

about the present mental competence of [Mr./Ms.] [name of defendant], and I state that doubt for the record under [Penal Code section 1368](#).

(2) Ask defense counsel his or her opinion of the defendant's competence. (*Note:* If the defendant is not represented by counsel, the court must appoint an attorney. In addition, the court must allow a recess, if requested or on the court's own motion, to permit defense counsel to form an opinion of the defendant's competence. [Pen C §1368\(a\)](#).)

[Mr./Ms.] [name of defense counsel], in your opinion, is [Mr./Ms.] [name of defendant] mentally incompetent? In other words, is [Mr./Ms.] [name of defendant], as a result of a mental disorder, unable to understand the nature of the criminal proceedings or to assist you in the conduct of a defense in a rational manner?

[Defense counsel agrees, e.g.]

If the court please, I have tried to interview [Mr./Ms.] [name of defendant] on several occasions. I have been unable to communicate with [him/her]. [Mr./Ms.] [name of defendant] seems incapable of conducting a rational conversation. [Mr./Ms.] [name of defendant] states that [he/she] does not remember any recent event. I believe [Mr./Ms.] [name of defendant] may well be mentally incompetent.

[Judge continues]

(3) Order a competency hearing and suspend the criminal proceedings under [Pen C §§1368.1](#) and [1369](#). (*Note:* The court may want to appoint a mental health expert under [Evid C §730](#) to help the court to determine whether to suspend the proceedings.)

Thank you counsel. Based on what you have told me and on my observations of [Mr./Ms.] [name of defendant]'s conduct in court and the report of Dr. [name of psychiatrist] appointed under [Evidence Code section 730](#) to help me resolve my initial doubt, I find there is substantial evidence of [Mr./Ms.] [name of defendant]'s mental incompetence. The court orders that the question of the mental competence of [Mr./Ms.] [name of defendant] be determined in a hearing under [Penal Code sections 1368.1](#) and [1369](#). Further proceedings in this case are suspended until the question of the mental competence of [Mr./Ms.] [name of defendant] has been determined.

[Mr./Ms.] [name of defense counsel], I take it from your statements to the court that [Mr./Ms.] [name of defendant] is at this time seeking a finding of mental incompetence to stand trial?

[Defense counsel responds]

That is the position of [Mr./Ms.] [name of defendant].

(4) Advise the defendant of his or her rights.

[Mr./Ms.] [name of defendant], I advise you at this time that I have expressed a doubt about your mental capacity to stand trial. I have ordered a special hearing in which a determination will be made about your ability to stand trial. If you are found mentally able to do so, the criminal proceedings will continue. If you are found mentally incompetent to stand trial, you will be placed in a state hospital or other suitable facility until such time as you are mentally able to stand trial.

It is my duty to advise you of certain constitutional and statutory rights:

You are entitled to a speedy and public trial on the question of your mental capacity to stand trial.

You have a right to an attorney. If you cannot afford an attorney, an attorney will be appointed to represent you at no cost to you.

Your present attorney will continue to represent you in this special trial.

You are entitled to confront, that is, to face and hear all the witnesses who may testify against you, and you have the right, through your attorney, to cross-examine each witness.

You have the right to present evidence on your behalf.

You are entitled to have the process of this court to compel the attendance of witnesses and/or records on your behalf; that means that if there are witnesses whom you wish to testify, you may have the clerk of this court issue subpoenas for those witnesses at no cost to you.

You may be a witness at this special trial, but only if you wish to take the stand. However, no one can make you testify against yourself at any time.

*Note:* The court need not advise a defendant represented by counsel of the right to a jury trial; a jury trial must be requested by the defendant or defense counsel.

(5) Appoint psychiatric examiner(s). (*Note:* The court must appoint two psychiatrists or licensed psychologists if the defendant or defense counsel informs the court that the defendant is not seeking a finding of mental incompetence. One of the doctors may be named by the defense and the other named by the prosecution. [Pen C §1369\(a\)](#).)

Under [Penal Code section 1369\(a\)](#), I now appoint Dr. \_\_\_\_\_ [and Dr. \_\_\_\_\_] to examine [Mr./Ms.] [name of defendant] and report

to the court in writing [*his/her/their*] opinion(s) about whether the defendant is competent to stand trial. Specifically, the following questions must be addressed:

Is [*Mr./Ms.*] [*name of defendant*] presently able to understand the nature and purpose of the proceedings taken against [*him/her*]?

Is [*he/she*] presently able to comprehend [*his/her*] own status and condition in reference to the proceedings?

Is [*he/she*] presently able to cooperate in a rational manner with counsel in presenting a defense?

In addition, if the doctor(s) believe(s) the defendant is not competent, the following questions about the use of antipsychotic medications must be addressed:

Is it medically appropriate to treat the defendant's psychiatric condition with antipsychotic medication?

Is this medication likely to restore the defendant to mental competence?

Does the defendant have the capacity to make decisions about such medication?

What are the likely or potential side effects of such medication?

Is such medication likely to have side effects that interfere with the defendant's ability to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a reasonable manner?

Are less intrusive treatments likely to have substantially the same results as this medication?

If untreated with antipsychotic medication, will the defendant probably suffer serious harm to his or her physical or mental health?

Is the defendant a danger to himself or herself or to others?

(6) Set a date for the defendant to return to court to review the findings of the psychiatrist(s). (*Note:* Defense counsel and the prosecutor may stipulate to the findings of the psychiatrist(s) at this review hearing. If they do not, a formal revocation hearing date must be set.)

The case is continued to [*date*], at \_\_\_\_\_.m. for review and consideration of the doctors' findings on the question of defendant's present mental competence.



[Mr./Ms.] [name of defendant], at this review hearing you will be able to discuss with your counsel the report(s) filled by the doctor(s) that I have assigned to evaluate your competence to stand trial.

If you and your counsel agree with the conclusion(s) of the reports, you may request the court to make a determination of competency based on the reports. However, if you do dispute the conclusion(s) reached by the doctor(s) and therefore do not want the court to make a determination based solely on the report(s), the court will schedule a date for a formal competency hearing.

**B. [§63.87] Script: Judge Expresses Doubt About Defendant’s Present Mental Competence Under Pen C §1368; Defense Counsel Disagrees**

*[Judge states doubt about the defendant’s mental competence and asks defense counsel’s opinion (see steps (1) and (2) in §63.86).]*

*[Defense counsel states]*

If the court please, I respectfully disagree with the court’s opinion. I have had many interviews with [Mr./Ms.] [name of defendant] and I have been able to communicate with [him/her]. [Mr./Ms.] [name of defendant] has an excellent memory about recent events, and I am satisfied [Mr./Ms.] [name of defendant] knows that [he/she] is on trial, what [he/she] is charged with, and the consequences of a conviction. I feel satisfied that with the assistance of [Mr./Ms.] [name of defendant] I will be able to prepare this case for a defense, and I see no necessity for a hearing on the question of [his/her] mental competence. In my considered judgment, [Mr./Ms.] [name of defendant] is mentally competent, and we will be prepared to proceed to trial in a timely and orderly fashion.

☛ **JUDICIAL TIP:** When there is a disagreement between the court and defense counsel about the defendant’s mental competence, the court should, if it has not already done so, question the defendant and personally find out, on the record, if the defendant is aware of the nature of the proceedings, and if he or she can cooperate with defense counsel in preparing a defense.

*[Alternative 1: If court no longer doubts defendant’s mental capacity and concludes that there is no substantial evidence of defendant’s incompetence]*

Defense counsel, I respect your opinion and I appreciate your giving me your views for the record. Based on what you have told me and my questioning of [Mr./Ms.] [name of defendant], I find that there is no substantial evidence of [Mr./Ms.] [name of defendant]’s mental incompetence before me and therefore no need to order a competency

hearing. I will permit [Mr./Ms.] [name of defendant] to proceed with the criminal proceedings.

*[Alternative 2: If court still doubts defendant's mental capacity, court exercises discretion to order hearing when evidence of incompetence is less than substantial]*

I respect your opinion and I appreciate your giving me your views for the record. However, I am satisfied, based on the conduct of [Mr./Ms.] [name of defendant] that I have observed in the courtroom and [his/her] responses to my questions [and the report of Dr. [name of psychiatrist or psychologist] appointed under [Evidence Code section 730](#) to help me resolve my initial doubt], that a serious question remains in the court's mind about [Mr./Ms.] [name of defendant]'s ability to stand trial, and I am still going to order that the question of [Mr./Ms.] [name of defendant]'s mental competence be determined in a hearing under [Penal Code sections 1368.1](#) and [1369](#).

*[Alternative 3: Court finds that there is substantial evidence of incompetence]*

I respect your opinion and I appreciate your giving me your views for the record. However, I am satisfied, based on the conduct of [Mr./Ms.] [name of defendant] that I have observed in the courtroom and [his/her] responses to my questions [and the report of Dr. [name of psychiatrist or psychologist] appointed under [Evidence Code section 730](#) to help me resolve my initial doubt], that the court is confronted with substantial evidence of [Mr./Ms.] [name of defendant]'s mental incompetence, and that I have no discretion, and no alternative, but to order that the question of [Mr./Ms.] [name of defendant]'s mental competence be determined in a hearing under [Penal Code sections 1368.1](#) and [1369](#).

Further proceedings in this case are suspended until the question of the mental competence of [Mr./Ms.] [name of defendant] has been determined.

[Mr./Ms.] [name of defense counsel], I take it from your statements that [Mr./Ms.] [name of defendant] is not at this time seeking a finding of mental incompetence to stand trial?

*[Defense counsel responds]*

That is the defendant's position at this time.

[Advise defendant of his or her rights, appoint two psychiatric examiners, and set a hearing date (see steps 4–6 in [§63.86](#)).]

**C. [§63.88] Script: Judge Expresses Doubt About Defendant's Present Mental Competence Under Pen C §1367.1 (Misdemeanor Case)**

BULLETIN: The Second District Court of Appeal has declared that [Pen C §1367.1](#) is unconstitutional, holding that the statute deprives misdemeanor defendants of equal protection. The court found no compelling state interest in requiring a misdemeanor defendant, believed to be incompetent because of a mental disorder, to submit to involuntary evaluation and treatment under the Lanterman-Petris-Short Act instead of or prior to a competency determination. *Pederson v Superior Court* (2003) 105 CA4th 931, 939–942, 130 CR2d 289. The court directs all trial courts to handle misdemeanor cases according to [Pen C §1368](#), in the same manner as felony cases (see checklist in [§63.2](#), and [§§63.6–63.27](#)). 105 CA4th at 943. CJER has chosen to retain the script below and [§§63.55–63.77](#), addressing procedures under [Pen C §1367.1](#), pending further case law developments and/or legislative revision of the codes.

*[Judge states doubt about the defendant's mental competence and asks defense counsel's opinion (see steps (1) and (2) in [§63.86](#)).]*

*[Alternative 1: If court no longer doubts defendant's mental capacity and concludes that there is no substantial evidence of defendant's incompetence]*

Thank you counsel. *[Based on what you told me and /Despite your opinion, based on]* the conduct of *[Mr./Ms.] [name of defendant]* in this courtroom and *[his/her]* responses to my questions, I find that there is no substantial evidence of *[Mr./Ms.] [name of defendant]*'s mental incompetence. I will permit *[Mr./Ms.] [name of defendant]* to proceed with the criminal proceedings, because, in my considered judgment, there is at this point no need to suspend the proceedings and order a 72-hour evaluation and treatment.

*[Alternative 2: If court still doubts defendant's mental capacity, court exercises discretion to order hearing when evidence of incompetence is less than substantial]*

Thank you counsel. *[Based on what you told me and /Despite your opinion, based on]* the conduct of *[Mr./Ms.] [name of defendant]* that I have observed in this courtroom and my questioning of *[Mr./Ms.] [name of defendant]*, a serious question remains in the court's mind about *[Mr./Ms.] [name of defendant]*'s ability to stand trial, and I am going to order that *[Mr./Ms.] [name of defendant]* be sent to *[name of facility]* for a 72-hour evaluation and treatment under [Welfare and Institutions Code section 5150](#).

*[Alternative 3: Court finds that there is substantial evidence of incompetence]*

Thank you counsel. *[Based on what you told me and/Despite your opinion, based on]* the conduct of *[Mr./Ms.] [name of defendant]* that I have observed in this courtroom and my questioning of *[Mr./Ms.] [name of defendant]*, the court is confronted with substantial evidence of *[Mr./Ms.] [name of defendant]*'s mental incompetence. Therefore, I have no discretion, and no alternative, but to order that *[Mr./Ms.] [name of defendant]* be sent to *[name of facility]* for a 72-hour evaluation and treatment under [Welfare and Institutions Code section 5150](#).

Further proceedings in this case are suspended for the duration of the evaluation and treatment under [Penal Code section 1367.1\(c\)](#).

*[Mr./Ms.] [name of defendant]*, I advise you at this time that I have reason to believe that you may not have the mental capacity to stand trial. Therefore, I am sending you to *[name of facility]* for a 72-hour treatment and evaluation. At the conclusion of the treatment and evaluation, you will return to this court.

If, after reviewing the results of your evaluation and treatment, the court concludes that you are mentally able to stand trial, the criminal proceedings will continue. However, if the court has reason to believe that you may be incompetent to stand trial despite the treatment, the criminal proceedings will remain suspended and a competency hearing will be held under [Penal Code sections 1368.1](#) and [1369](#).

*[Mr./Ms.] [name of defendant]* is ordered remanded to the custody of the sheriff. The sheriff is directed to transport *[Mr./Ms.] [name of defendant]* to *[name of facility]* to begin the evaluation and treatment.

**D. [§63.89] Script: Findings Regarding Administration of Antipsychotic Medication**

*[Defendant has capacity and does consent ([Pen C §1370\(a\)\(2\)\(B\)\(i\)](#))]*

I find that the defendant, with the advice of counsel, has knowingly, voluntarily, and intelligently consented to the administration of antipsychotic medication. This medication may be given to the defendant as prescribed by a treating psychiatrist. If the defendant withdraws his consent, no further medication may be administered until further order of the court.

*[Defendant does not or cannot consent ([Pen C §1370\(a\)\(2\)\(B\)\(ii\)](#))]*

*Finding I: Lack of Capacity (Pen C §1370(a)(2)(B)(ii)(I)):*

The defendant lacks the capacity to make decisions regarding antipsychotic medication. If the defendant is not treated with antipsychotic medication, it is probable that the defendant will suffer serious harm to his/her physical or mental health. It is medically appropriate to treat the defendant's psychiatric condition with antipsychotic medication.

*Finding II: Danger to Others (Pen C §1370(a)(2)(B)(ii)(II))]*

As a result of the defendant's psychiatric condition, he/she presents a danger of inflicting physical harm on others.

*Finding III: Medication Will Render Defendant Competent to Stand Trial (Pen C §1370(a)(2)(B)(ii)(III))*

[Note: Use Finding III only if Findings I and II are inapplicable.]

The defendant faces criminal charges, and the government has a legitimate and important interest in bringing these charges to trial. Although the defendant is not a danger to others and the defendant does have the capacity to make decisions regarding antipsychotic medication, I find that the administration of such medication is substantially likely to render the defendant competent to stand trial. Antipsychotic medication is unlikely to have side effects that would interfere with the defendant's ability to understand the nature of the criminal proceedings or to assist counsel in conducting a defense in a reasonable manner. Less intrusive treatments are unlikely to have substantially the same results as such medication. And antipsychotic medication is in the defendant's best medical interest in light of his/her medical condition.

**E. [§63.90] Written Form: Letter Appointing Mental Health  
Expert Under Evid C §730**

\_\_\_\_\_, 20\_\_\_\_

In re: People vs.

Case No. \_\_\_\_\_

To: \_\_\_\_\_

Pursuant to [section 730 of the Evidence Code](#), you have been appointed by the Court, and under [section 1368 of the Penal Code](#), you are to examine the defendant, who has been [*charged with/convicted of* \_\_\_\_\_], [*and is awaiting sentencing*].

Please make an examination of this defendant and report your findings to the Court about the following:

1. Is the defendant presently able to understand the nature and purpose of the criminal proceedings being taken against [*him/her*]?
2. Does the defendant comprehend [*his/her*] own status and condition in reference to these proceedings?
3. Is the defendant presently capable of assisting defense counsel in conducting a defense, or able to conduct [*his/her*] own defense in a rational manner?

In addition, if you believe that the person is not competent, please address the following questions about the use of antipsychotic medications:

1. Is it medically appropriate to treat the defendant's psychiatric condition with antipsychotic medication?
2. Is this medication likely to restore the defendant to mental competence?
3. Does the defendant have the capacity to make decisions about such medication?
4. What are the likely or potential side effects of such medication?
5. Is such medication likely to have side effects that interfere with the defendant's ability to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a reasonable manner?

6. Are less intrusive treatments likely to have substantially the same results as this medication?

7. If untreated with antipsychotic medication, will the defendant probably suffer serious harm to his or her physical or mental health?

8. Is it medically appropriate to administer such medication in the county jail?

9. Is the defendant a danger to himself or herself or to others?

You are instructed to file your report no later than [date], and to submit your billing to the following: \_\_\_\_\_.

The next court proceeding is set for [date], at \_\_\_\_\_.m.

Thank you for your cooperation.

Very truly yours,

\_\_\_\_\_

Judge of the Superior Court

cc: \_\_\_\_\_, Attorney for Defendant

\_\_\_\_\_, Deputy District Attorney.



**F. [§63.91] Written Form: Referral of Defendant for Mental Health Evaluation Under Pen C §4011.6**

SUPERIOR COURT OF CALIFORNIA

COUNTY OF \_\_\_\_\_

THE PEOPLE OF THE STATE

OF CALIFORNIA,

NO. \_\_\_\_\_

Plaintiff,

REFERRAL FOR MENTAL  
HEALTH EVALUATION UNDER  
**PENAL CODE SECTION 4011.6**

vs.

\_\_\_\_\_,

Defendant.

The Court has reason to believe that the defendant may be mentally disordered and, as a result of the disorder, may be *[a danger to [himself/herself] /a danger to others/gravely disabled and unable to provide for [his/her] personal needs for food, clothing, or shelter]*.

The Court's belief is based on the following behavior observed and/or information received: *[specify in detail the facts supporting referral]*.

THEREFORE, IT IS HEREBY ORDERED as follows:

1. Pursuant to **Penal Code section 4011.6**, the Sheriff of \_\_\_\_\_ County shall transport the defendant to *[specify facility, e.g., the Mountain Medical Center ]*, a designated 72-hour treatment and evaluation facility, located in \_\_\_\_\_, California.

2. *[Name of facility]* shall determine whether the defendant is, as a result of mental disorder, a danger to *[himself/herself]* or to others or is gravely disabled under **Welfare and Institutions Code section 5150**.

3. At the end of the 72-hour evaluation, *[name of facility]* shall forward a report on the defendant's condition to *[name and address of court]*.

4. The Sheriff of \_\_\_\_\_ County shall retain custody of the defendant during the mental health evaluation at *[name of facility]*, and the Sheriff of \_\_\_\_\_ County shall transport the defendant back to the \_\_\_\_\_ County Jail at the conclusion of the mental health evaluation.

Dated: \_\_\_\_\_

\_\_\_\_\_  
Judge of the Superior Court

**G. [§63.92] Written Form: Order for Examination and Determination of Mental Competence**

SUPERIOR COURT OF CALIFORNIA  
COUNTY OF \_\_\_\_\_

THE PEOPLE OF THE STATE  
OF CALIFORNIA,

NO. \_\_\_\_\_

Plaintiff,

ORDER FOR EXAMINATION AND  
DETERMINATION OF MENTAL  
COMPETENCE ([PENAL CODE  
SECTION 1368](#))

vs.

\_\_\_\_\_,  
Defendant.

On [date], the above-named defendant was charged in this Court with a violation of section(s) \_\_\_\_\_.

A doubt has arisen during the pendency of the action about the defendant's present mental competence.

The trial judge having therefore suspended all proceedings in the criminal action and ordered that a determination be made about the defendant's mental competence,

IT IS ORDERED THAT:

1. Proceedings be held in the Superior Court in accordance with [Penal Code sections 1368](#) and [1369](#) on the issue of mental competence.

2. ☐ A forensic psychiatrist from the staff of [name of facility],

[Or]

☐ [Name of psychiatrist], M.D., [and [name of psychiatrist], M.D.,] [is/are] appointed to make a personal examination of the defendant to ascertain whether the defendant is presently mentally competent and whether treating the defendant with antipsychotic medication is medically appropriate; said examiner(s) [is/are] directed to file a written report of the result of the examination with the Court and to attend and testify, if needed, at the hearing.

3. The defendant is

☐ at liberty, and appointment for examination should be made through counsel.

[Or]

☐ in custody in the County Jail, where examination may be made at the convenience of the doctor(s).

4. The defendant shall

☐ appear at

[Or]

☐ be transported by the Sheriff of \_\_\_\_\_ County to

the courtroom of the Superior Court, Department \_\_\_\_\_,  
on [date], at \_\_\_\_\_.m., which is fixed as the time and place for hearing  
and determination of the issue of present mental competence.

Dated: \_\_\_\_\_

\_\_\_\_\_  
Judge of the Superior Court

**H. [§63.93] Written Form: Order To Initiate Conservatorship Proceedings**

SUPERIOR COURT OF CALIFORNIA  
COUNTY OF \_\_\_\_\_

THE PEOPLE OF THE STATE  
OF CALIFORNIA,

NO. \_\_\_\_\_

Plaintiff,

vs.

ORDER TO INITIATE  
CONSERVATORSHIP  
PROCEEDINGS (PENAL  
CODE SECTION 1370(c)(2))

\_\_\_\_\_,  
Defendant.

The defendant, committed to a state hospital for care and treatment of the mentally incompetent, was returned to this Court pursuant to ☐ Penal Code section 1370(b)(1) ☐ Penal Code section 1370(b)(2) ☐ Penal Code section 1370(c)(1), and it appearing to the Court that the defendant is gravely disabled as defined in Welfare and Institutions Code section 5008(h)(1)(B),

IT IS ORDERED that the conservatorship investigator of \_\_\_\_\_ County initiate conservatorship proceedings under Welfare and Institutions Code section 5350.

Dated: \_\_\_\_\_

\_\_\_\_\_  
Judge of the Superior Court

**V. [§63.94] ADDITIONAL REFERENCES**

California Criminal Law Procedure and Practice, chap 48 (Cal CEB 2009)  
5 Witkin & Epstein, California Criminal Law, *Criminal Trial*, §§694–717  
(3rd ed 2000)

## Table of Statutes

### CALIFORNIA

<b>CONSTITUTION</b>	1001.21
Art I, §12(b): 63.47	63.72
	1001.21(b)
<b>CODE OF CIVIL PROCEDURE</b>	63.72
231	1001.22
63.29	63.72
629	1001.31
63.32	63.72
2016–2036	1049.5
63.26	63.77
2019(a)(4)	1203.2
63.22	63.40, 63.65
2032(f)	1367–1368
63.26	63.17
	1367–1375.5
	63.39
<b>EVIDENCE CODE</b>	1367(a)
730	63.5
63.2, 63.12, 63.86–63.87, 63.90	1367(b)
800	63.5, 63.55
63.31	1367.1
954	63.3, 63.5, 63.55, 63.58, 63.77, 63.88
63.10	1367.1(a)
	63.3, 63.56–63.57
<b>PENAL CODE</b>	1367.1(b)
190.2	63.3, 63.58, 63.78
63.85	1367.1(b)–(c)
290	63.3
63.39, 63.47	1367.1(c)
667.5(c)	63.3, 63.58, 63.88
63.48	1367.1(d)
859b	63.3, 63.59
63.19, 63.77	1368
995	63.2–63.4, 63.6–63.7, 63.9, 63.12–63.16, 63.18, 63.39, 63.47, 63.55, 63.77, 63.86, 63.88, 63.90, 63.92
63.19	
1001.20	
63.72	
1001.20–1001.34	
63.72	

1368(a) 63.2, 63.6, 63.9–63.11, 63.13, 63.86	1370(a)(1)(A) 63.32, 63.73
1368(b) 63.2, 63.6, 63.13, 63.17	1370(a)(1)(B)(i) 63.24, 63.32, 63.35, 63.38, 63.41, 63.49
1368(b)–(c) 63.2	1370(a)(1)(B)(ii) 63.47
1368(c) 63.2–63.3, 63.18, 63.32	1370(a)(1)(B)(iii) 63.47
1368.1 63.13, 63.59, 63.86–63.88	1370(a)(1)(C) 63.38
1368.1(a) 63.19	1370(a)(1)(D)–(E) 63.48
1368.1(b) 63.58	1370(a)(1)(F) 63.48
1368.1(c) 63.19, 63.58	1370(a)(2)(A) 63.35
1369 63.2–63.3, 63.12–63.13, 63.24, 63.29, 63.31, 63.44, 63.59, 63.86– 63.88, 63.92	1370(a)(2)(B) 63.37
1369(a) 63.2, 63.22–63.23, 63.31, 63.86	1370(a)(2)(B)(i) 63.36–63.37, 63.89
1369(b)(1) 63.31	1370(a)(2)(B)(ii)(I) 63.37, 63.89
1369(b)(2) 63.30–63.31	1370(a)(2)(B)(ii)(II) 63.37, 63.89
1369(c) 63.31	1370(a)(2)(B)(ii)(III) 63.37, 63.89
1369(d) 63.31	1370(a)(2)(B)(iii) 63.37
1369(e) 63.31	1370(a)(2)(B)(iv) 63.37
1369(f) 63.30, 63.32	1370(a)(2)(B)(v) 63.42
1369.1 63.23	1370(a)(2)(C) 63.36–63.37
1369.1(a) 63.23	1370(a)(3) 63.39, 63.47
1370 63.5, 63.24, 63.55, 63.73, 63.76	1370(a)(4) 63.47
	1370(a)(6)(A) 63.40, 63.46

1370(a)(6)(B)	1370.01(a)(2)(B)(ii)(I)
63.47	63.62
1370(b)	1370.01(a)(2)(B)(ii)(II)
63.44	63.62
1370(b)(1)	1370.01(a)(2)(B)(ii)(III)
63.42, 63.44–63.45, 63.93	63.62
1370(b)(2)	1370.01(a)(2)(B)(iii)
63.44–63.45, 63.93	63.62
1370(b)(3)	1370.01(a)(2)(B)(iv)
63.44	63.62
1370(b)(4)	1370.01(a)(2)(B)(v)
63.42	63.67
1370(c)	1370.01(a)(2)(C)
63.39, 63.76	63.61–63.62
1370(c)(1)	1370.01(a)(3)
63.43–63.45, 63.93	63.64
1370(c)(2)	1370.01(a)(4)
63.44–63.45, 63.93	63.66
1370(c)(3)	1370.01(a)(5)
63.42, 63.45	63.65, 63.71
1370(c)(4)	1370.01(b)
63.42	63.67, 63.69–63.70
1370(d)	1370.01(b)–(c)(1)
63.46	63.69
1370(e)	1370.01(c)
63.44, 63.46, 63.76	63.64, 63.76
1370(g)	1370.01(c)(1)
63.47	63.68–63.70
1370.01	1370.01(c)(2)
63.5, 63.55, 63.76	63.69–63.70
1370.01(a)	1370.01(d)
63.32	63.71
1370.01(a)(1)	1370.01(d)–(e)
63.32, 63.49, 63.60,	63.69
63.63, 63.73	1370.01(e)
1370.01(a)(2)(A)	63.71, 63.76
63.60	1370.1
1370.01(a)(2)(B)	63.5, 63.72, 63.76
63.62	1370.1(a)(1)(H)
1370.01(a)(2)(B)(i)	63.72
63.61–63.62	1370.1(a)(2)
1370.01(a)(2)(B)(ii)	63.72
63.61–63.62	1370.1(b)(1)
	63.72



1370.1(c)	1600–1620
63.76	63.41, 63.48–63.49, 63.66
1370.1(c)(2)	1601
63.72	63.49
1370.1(d)	1601(a)
63.72	63.50
1370.2	1602(a)(1)
63.46, 63.71	63.49
1371	1602(a)(2)
63.38, 63.63	63.49
1372	1602(a)(3)
63.18, 63.53, 63.63, 63.74	63.49
1372(a)(1)	1602(b)
63.73	63.49
1372(a)(2)	1602(c)
63.73	63.49
1372(b)	1603(a)(1)
63.73	63.50
1372(c)	1603(a)(2)
63.73–63.74	63.50
1372(d)	1603(a)(3)
63.74–63.75	63.50
1372(e)	1603(b)
63.75	63.50
1374	1603(c)
63.53, 63.73	63.50
1375.5	1604
63.53, 63.76	63.50–63.51
1376	1604(a)
63.85	63.51
1376(b)(1)	1604(b)
63.85	63.51
1382	1604(c)
63.82	63.51
1382(a)(2)	1604(c)–(d)
63.77	63.51
1382(a)(3)	1604(d)
63.77	63.51
1385	1605(c)
63.46, 63.71	63.52
1538.5	1605(d)
63.19, 63.58	63.52
1600	1606
63.76	63.51–63.52

1607  
63.53, 63.73  
1608  
63.54  
1610  
63.54  
4011.6  
63.1–63.4, 63.9, 63.58,  
63.78–63.84, 63.91  
4019  
63.76

#### **WELFARE AND INSTITUTIONS CODE**

5000–5550  
63.1, 63.4, 63.9  
5008  
63.80  
5008(h)  
63.4, 63.84  
5008(h)(1)(A)  
63.70  
5008(h)(1)(B)  
63.45, 63.93  
5008(m)  
63.37, 63.62  
5150  
63.3–63.4, 63.78, 63.88,  
63.91  
5151  
63.4  
5150–5157  
63.80  
5250–5259.3  
63.80  
5260–5268  
63.80  
5275–5278  
63.80  
5300–5309  
63.80  
5325–5337  
63.80

5350  
63.93  
5350–5371  
63.45, 63.70, 63.80  
5352.5  
63.45, 63.70, 63.84  
6500  
63.72  
6513  
63.72

#### **ACTS BY POPULAR NAME**

Civil Discovery Act  
63.26  
Lanterman-Petris-Short (LPS)  
Act  
63.1, 63.3–63.4, 63.9,  
63.43–63.44, 63.46,  
63.68–63.69, 63.71,  
63.73, 63.76, 63.80,  
63.82–63.83

#### **SESSION LAWS**

Stats 2007, ch 556, §1: 63.23

#### **CALIFORNIA RULES OF COURT**

4.130(b)  
63.22  
4.130(b)(1)  
63.13  
4.130(b)(2)  
63.6, 63.10  
4.130(b)(3)  
63.19  
4.130(c)(1)  
63.18  
4.130(c)(2)  
63.77  
4.130(c)(3)(A)  
63.77  
4.130(c)(3)(B)  
63.77

4.130(d)(1)	4.130(e)(4)(A)
63.22	63.32
4.130(d)(1)(A)	4.130(e)(4)(B)
63.22	63.32
4.130(d)(1)(B)	4.130(f)(1)
63.22	63.32
4.130(d)(2)	4.130(f)(2)
63.22	63.32
4.130(d)(3)	
63.24	
4.130(e)(1)	
63.22	
4.130(e)(2)	
63.30	
4.130(e)(3)	
63.31	

**JURY INSTRUCTIONS****Criminal (CALCRIM)**

360

63.25

3451

63.30

## Table of Cases

- Amador, *People v* (1988) 200 CA3d 1449, 246 CR 605: §63.17
- Arcega, *People v* (1982) 32 C3d 504, 186 CR 94: §63.24
- Ary, *People v* (2004) 118 CA4th 1016, 13 CR3d 482: §63.34
- Atkins v Virginia (2002) 536 US 304, 122 S Ct 2242, 153 L Ed 2d 335: §63.85
- Avila, *People v* (2004) 117 CA4th 771, 11 CR3d 894: §63.17
- Banks, *In re* (1979) 88 CA3d 864, 152 CR 111: §§63.43, 63.68
- Baqleh v Superior Court (2002) 100 CA4th 478, 122 CR2d 673: §§63.22, 63.25–63.26, 63.29
- Bayramoglu v Superior Court (1981) 124 CA3d 718, 176 CR 487: §63.19
- Beivelman, *People v* (1968) 70 C2d 60, 73 CR 521: §63.17
- Bolden, *People v* (1979) 99 CA3d 375, 160 CR 268: §§63.10, 63.31
- Booth v Superior Court (1997) 57 CA4th 91, 66 CR2d 758: §63.19
- Bryant, *People v* (2009) 174 CA4th 175, 94 CR3d 151: §63.76
- Burney, *People v* (1981) 115 CA3d 497, 171 CR 329: §§63.16–63.17
- Cadogan, *People v* (2009) 173 CA4th 1502, 93 CR3d 881: §63.20
- Campbell, *People v* (1987) 193 CA3d 1653, 239 CR 214: §63.12
- Carter v Superior Court (2006) 141 CA4th 992, 1001, 46 CR3d 507: §63.37
- Chambers v Municipal Court (1974) 43 CA3d 809, 118 CR 120: §63.19
- Claxton, *People v* (1982) 129 CA3d 638, 181 CR 281: §§63.13, 63.17
- Conrad, *People v* (1982) 132 CA3d 361, 182 CR 912: §§63.5, 63.32
- Cooks, *People v* (1983) 141 CA3d 224, 190 CR 211: §63.17
- Danielson, *People v* (1992) 3 C4th 691, 13 CR2d 1: §63.17
- Davis, *In re* (1973) 8 C3d 798, 106 CR 178: §§63.44, 63.69
- Day, *People v* (1988) 201 CA3d 112, 247 CR 68: §63.7
- Deere, *People v* (1985) 41 C3d 353, 222 CR 13: §63.17
- DeGuzman, *People v* (1995) 33 CA4th 414, 39 CR2d 1137: §63.54
- Duncan, *People v* (2000) 78 CA4th 765, 93 CR2d 173: §63.19
- Frye, *People v* (1998) 18 C4th 894, 77 CR2d 25: §63.17
- Godinez v Moran (1993) 509 US 389, 113 S Ct 2680, 125 L Ed 2d 321: §63.5
- Hale, *People v* (1988) 44 C3d 531, 244 CR 114: §§63.2, 63.5, 63.15, 63.18
- Harris, *People v* (1993) 14 CA4th 984, 18 CR2d 92: §§63.22, 63.31
- Hayes, *People v* (1999) 21 C4th 1211, 91 CR2d 211: §§63.5, 63.13, 63.15

- Hays**, *People v* (1976) 54 CA3d 755, 126 CR 770: §63.17
- Hernandez, *In re* (2000) 16 CA4th 459, 49 CR3d 3: §63.24
- Hightower, *People v* (1996) 41 CA4th 1108, 49 CR2d 40: §63.21
- Hill, *People v* (1967) 67 C2d 105, 60 CR 234: §§63.28–63.29
- Horton, *People v* (1995) 11 C4th 1068, 47 CR2d 516: §63.21
- Howard, *People v* (1992) 1 C4th 1132, 5 CR2d 268: §§63.2, 63.17
- Humphrey, *People v* (1975) 45 CA3d 32, 119 CR 74: §63.17
- In re Banks* (1979) 88 CA3d 864, 152 CR 111: §§63.43, 63.68
- In re Davis* (1973) 8 C3d 798, 106 CR 178: §§63.44, 63.69
- In re Hernandez* (2006) 143 CA4th 459, 49 CR3d 301: §63.24
- In re McPherson* (1985) 176 CA3d 332, 222 CR 416: §63.54
- In re Polk* (1999) 71 CA4th 1230, 84 CR2d 389: §63.43
- In re Spencer* (1965) 63 C2d 400, 46 CR 753: §63.25
- Indiana v Edwards* (2008) \_\_\_ US \_\_\_, 128 S Ct 2379, 171 L Ed 2d 345: §63.21
- Jablonski, *People v* (2006) 37 C4th 774, 38 CR3d 98: §63.24
- Jernigan, *People v* (2003) 110 CA4th 131, 1 CR3d 511: §63.31
- Jones, *People v* (1991) 53 C3d 1115, 282 CR 465: §63.33
- Kaplan, *People v* (2007) 149 CA4th 372, 57 CR3d 143: §§63.33, 63.34
- Karriker, *People v* (2007) 149 CA4th 763, 57 CR3d 412: §63.44
- Laudermilk, *People v* (1967) 67 C2d 272, 61 CR 644: §63.15
- Lawley, *People v* (2002) 27 C4th 102, 115 CR2d 614: §§63.28, 63.33
- Leever, *People v* (1985) 173 CA3d 853, 219 CR 581: §63.17
- Marks, *People v* (1988) 45 C3d 1335, 248 CR 874: §§63.15, 63.32
- Marshall, *People v* (1997) 15 C4th 1, 61 CR2d 84: §63.31
- Masterson, *People v* (1994) 8 C4th 965, 35 CR2d 679: §63.29
- Mayes, *People v* (1988) 202 CA3d 908, 248 CR 899: §63.22
- McDuffie, *People v* (2006) 144 CA4th 880, 50 CR3d 794: §63.37
- McPeters, *People v* (1992) 2 C4th 1148, 9 CR2d 834: §§63.24, 63.27, 63.29
- McPherson, *In re* (1985) 176 CA3d 332, 222 CR 416: §63.54
- Medina v California (1992) 505 US 437, 112 S Ct 2572, 120 L Ed 2d 353: §63.30
- Medina, *People v* (1995) 11 C4th 694, 47 CR2d 165: §§63.15, 63.17
- Medina, *People v* (1990) 51 C3d 870, 274 CR 849: §§63.30–63.31

- Mickle, *People v* (1991) 54 C3d 140, 286 CR 511: §63.31
- Miller v Superior Court (1978) 81 CA3d 132, 146 CR 253: §63.19
- Mixon, *People v* (1990) 225 CA3d 1471, 275 CR 817: §§63.30, 63.74
- Murrell, *People v* (1987) 196 CA3d 822, 242 CR 175: §§63.14, 63.74
- O'Dell, *People v* (2005) 126 CA4th 562, 23 CR3d 902: §§63.37, 63.62
- Pate v Robinson (1966) 383 US 375, 86 S Ct 836, 15 L Ed 2d 815: §63.5
- Pederson v Superior Court (2003) 105 CA4th 931, 130 CR2d 289: §§63.3, 63.55, 63.88
- Pennington, *People v* (1967) 66 C2d 508, 58 CR 374: §§63.12, 63.15–63.16, 63.34
- People v* \_\_\_\_\_. *See* name of defendant.
- Polk, *In re* (1999) 71 CA4th 1230, 84 CR2d 389: §63.43
- Pokovich, *People v* (2006) 39 C4th 1240, 48 CR3d 158: §63.24
- Powell, *People v* (1986) 180 CA3d 469, 225 CR 703: §63.11
- Prince, *People v* (1988) 203 CA3d 848, 250 CR 154: §63.31
- Rells, *People v* (2000) 22 C4th 860, 94 CR2d 875: §63.74
- Robinson, *People v* (2007) 151 CA4th 606, 60 CR3d 102: §§63.11, 63.33
- Rodrigues, *People v* (1994) 8 C4th 1060, 36 CR2d 235: §§63.17, 63.31
- Rogers, *People v* (2006) 39 C4th 826, 48 CR3d 1: §§63.15, 63.17
- Samuel, *People v* (1981) 29 C3d 489, 174 CR 684: §63.32
- Sell v U.S (2003) 539 US 166, 123 S Ct 2174, 156 L Ed 2d 197: §§63.37, 63.62
- Shephard v Superior Court (1986) 180 CA3d 23, 225 CR 328: §63.31
- Simpson, *People v* (1973) 30 CA3d 177, 106 CR 254: §63.73
- Skeirik, *People v* (1991) 229 CA3d 444, 280 CR 175: §63.30
- Solorzano, *People v* (2005) 126 CA4th 1063, 24 CR3d 735: §63.21
- Spencer, *In re* (1965) 63 C2d 400, 46 CR 753: §63.25
- Stankewitz, *People v* (1990) 51 C3d 72, 270 CR 817: §63.21
- Stankewitz, *People v* (1982) 32 C3d 80, 184 CR 611: §63.34
- Stanley, *People v* (1995) 10 C4th 764, 42 CR2d 543: §§63.29, 63.31
- Stewart, *People v* (1979) 89 CA3d 992, 153 CR 242: §63.17
- Stiltner, *People v* (1982) 132 CA3d 216, 182 CR 790: §§63.9, 63.17
- Superior Court, *People v* (McPeters) (1985) 169 CA3d 796, 215 CR 482: §63.29
- Tarantino v Superior Court (1975) 48 CA3d 465, 122 CR 61: §§63.10, 63.25

Taylor, People v (2009) 47 C4th 850, 102 CR3d 852: §§63.21, 63.33

Tomas, People v (1977) 74 CA3d 75, 141 CR 453: §§63.14, 63.16

Vass, People v (1987) 196 CA3d Supp 13, 242 CR 330: §63.82

Visciotti, People v (1992) 2 C4th 1, 5 CR2d 495: §63.12

Waterman, People v (1986) 42 C3d 565, 229 CR 796: §63.76

Weaver, People v (2001) 26 C4th 876, 111 CR2d 2: §§63.17, 63.27

Welch, People v (1999) 20 C4th 701, 85 CR2d 203: §§63.6, 63.13, 63.17

Williams, People v (1988) 44 C3d 883, 245 CR 336: §63.24

Worthy, People v (1980) 109 CA3d 514, 167 CR 402: §63.12

Zatko, People v (1978) 80 CA3d 534, 145 CR 643: §§63.14, 63.16